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**BANNING FAITH-BASED ARBITRATION: THE DEMANDS, THE DEBATE, AND  
THE IMPLICATIONS OF ONTARIO'S DECISION**

by

Joanna Taylor

A Thesis  
Submitted to the Faculty of Graduate Studies and Research  
through Political Science  
in Partial Fulfillment of the Requirements for  
the Degree of Master of Arts at the  
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## ABSTRACT

On Sunday, September 11, 2005, Dalton McGuinty announced Ontario's decision to ban faith-based arbitration. This decision came after the government-commissioned report by Marion Boyd suggested that faith-based arbitration continue as long as safeguards were introduced. In his announcement to the press, McGuinty argued that faith-based arbitration was inconsistent with a cohesive multicultural society and that it violated the principle of "one law for all Ontarians." These claims are contestable. Neither the theoretical approaches to pluralism nor Canada's multiculturalism policy conclusively shows that faith-based arbitration is inconsistent with multiculturalism or that it violates the rule of law. Ontario's decision ignores that the legal system might contribute to demands for faith-based arbitration by the insensitive and inconsistent treatment of religious marriage contracts. If Ontario had kept faith-based arbitration and introduced the safeguards Boyd proposed, it could have minimized harm to women, encouraged participation in the legal institution, and protected individual autonomy.

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## Chapter One Introduction

Faith-based arbitration is a legal mechanism that allows parties to resolve disputes according to religious customs, traditions and rules.<sup>1</sup> The Ontario *Arbitration Act* governs all legal arbitrations in the province.<sup>2</sup> It allows parties to resolve disputes according to the law of their choice, which until February 15, 2006, included the choice to resolve family disputes according to religious laws. The decisions arising from these arbitrations were binding in the secular court system. After the *Act* was introduced in 1991, it was used by Jewish, Christian and Ismaili Muslim groups to conduct legally binding faith-based arbitration.

In October 2003, Syed Mumtaz Ali established the Islamic Institute of Civil Justice (IICJ) to erect arbitration tribunals that would resolve disputes according to Shari'a law.<sup>3</sup> This was opposed by women's groups who protested that Shari'a law is inherently discriminatory towards women on issues of property division and child custody. In response to this controversy, the province commissioned former attorney general Marion Boyd to investigate and recommend whether the government should allow religious arbitration for family law disputes. Boyd's December 2004 report recommended that the province should allow faith-based arbitration as long as safeguards to protect women were put in place.<sup>4</sup>

Despite the report, women's groups continued to protest that religious arbitration would result in a discriminatory legal system. Demonstrations were held in Ontario,

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<sup>1</sup> John Syrtash, Religion and Culture in Canadian Family Law (Toronto: Butterworths, 1992), 98.

<sup>2</sup> *The Arbitration Act*, S.O. 1991, Chapter 17 [The *Act*].

<sup>3</sup> Annie Bunting, "Mediating Cultures, Arbitrating Family Disputes – the Proposed 'Shari'a Tribunals' in Ontario," draft, November 2004: 2.

<sup>4</sup> Marion Boyd, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion. Report prepared for the Attorney General and Minister Responsible for Women's Issues, December 2004, 133 [Protecting Choice].

Quebec, and several Western European countries on September 8, 2005 to convince the government that it could not enforce arbitration decisions governed by Shari'a law.<sup>5</sup> On Sunday, September 11, 2005, Ontario banned religious arbitration for all faiths. Premier Dalton McGuinty justified this decision by telling the press,

The notion of binding religious (tribunals) is inconsistent with one law for all Ontarians...We embrace our diversity, we support policies that support multiculturalism, but at the end of the day we are in this together. We are building on common ground and that is the law of the land.<sup>6</sup>

His statement implies that the ability to contract out of family law legislation through the *Act* is inconsistent with the principle of "one law for all Ontarians." The law is portrayed as the "common ground" that unites Ontarians of different cultural and religious backgrounds. McGuinty further explained that faith-based arbitration would be harmful to Ontario's cohesive multicultural character by interfering with this legal common ground.

The debate over Shariah [*sic*] law has caused us to ask a pretty fundamental question: Can religious arbitration be part of a cohesive multicultural society? It's become apparent to me that it cannot.<sup>7</sup>

This thesis questions the reasons McGuinty gave to justify Ontario's decision to ban faith-based arbitration. It suggests that religious arbitration may be implemented in a way that does not interfere with Ontario's legal common ground, and it is not necessarily inconsistent with a cohesive multicultural society. Faith-based arbitration could just as easily have been accepted on the grounds that it enhances Canada's multicultural society.

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<sup>5</sup> Melissa Leong, "Ontario Shariah law plan protested in Europe and Canada," National Post, 09 Sept. 2005, A6.

<sup>6</sup> Rob Ferguson, "'Same Law' for all Ontarians," Toronto Star, 14 Sept. 2005, A5.

<sup>7</sup> Keith Leslie, "Shariah Decision Upsets Jewish Groups," Canoe cnews. [online] (12 Sept. 2005, accessed 15 Nov., 2005); available from <http://cnews.canoe.ca/CNEWS/Politics/2005/09/11/1212487-cp.html>.



The literature review in Chapter Two focuses on the meaning of the term “multiculturalism.” Both the theoretical approaches and the Canadian policy are examined to determine whether there is a consistent idea of “multiculturalism” that would support Ontario’s decision to ban faith-based arbitration.

The Oxford English Dictionary defines “multicultural” as “of or pertaining to a society consisting of varied cultural groups.”<sup>8</sup> “Culture” has been defined as a “shared group identity”<sup>9</sup> and as “a body of beliefs and practices in terms of which a group of people understand themselves and the world and organize their individual and collective lives.”<sup>10</sup> Culture, then, can be an element of an individual’s personal identity.

Similarly, the federal government’s description of multiculturalism emphasizes identity, belonging, and acceptance.

Canadian multiculturalism is fundamental to our belief that all citizens are equal. Multiculturalism ensures that all citizens can keep their identities, can take pride in their ancestry and have a sense of belonging. Acceptance gives Canadians a feeling of security and self-confidence, making them more open to, and accepting of, diverse cultures. The Canadian experience has shown that multiculturalism encourages racial and ethnic harmony and cross-cultural understanding, and discourages ghettoization, hatred, discrimination and violence.<sup>11</sup>

While the goals of multiculturalism are relatively clear, there is no consensus about how they are best achieved. The two dominant theoretical approaches, “egalitarian liberalism” and “the politics of recognition,”<sup>12</sup> would achieve Canada’s goals of multiculturalism in different ways. While space constraints prohibit an exhaustive review

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<sup>8</sup> The Oxford English Dictionary, 2<sup>nd</sup> ed., s.v. “multicultural.”

<sup>9</sup> Brian Barry, Culture & Equality: An Egalitarian Critique of Multiculturalism. (Cambridge: Harvard University Press, 2001), 5.

<sup>10</sup> Bhiku Parekh, Rethinking Multiculturalism: Cultural Diversity and Political Theory, (Cambridge: Harvard University Press, 2000), 2-3.

<sup>11</sup> Department of Canadian Heritage, What is Multiculturalism? [online]; accessed 09 Aug. 2006; available from [http://www.canadianheritage.gc.ca/progs/multi/what-multi\\_e.cfm](http://www.canadianheritage.gc.ca/progs/multi/what-multi_e.cfm).

<sup>12</sup> This term is adopted from Charles Taylor’s The Politics of Recognition. It is used here to refer to those theories that are consistent with his argument. Charles Taylor, “The Politics of Recognition,” in Multiculturalism, ed. Amy Guttmann (Princeton: Princeton University Press, 1994). These theories are also commonly referred to as “multicultural theories” in the literature.

of these theories, the review shows that there is no consensus on how a polyethnic society should be governed or whether liberal democracies should adopt religious arbitration.

Liberal democracies attempt to include all members of society in a belief that the state functions best when as many citizens as possible participate in its political institutions.<sup>13</sup> It is important for citizens to feel that they can participate in the state's institutions in order to feel a sense of belonging to the country.<sup>14</sup> This includes participation in the legal system.

Chief Justice Beverly McLachlin has recognized that the court plays an important role in Canada's liberal democracy.

Much of our collective sense of freedom and safety comes from our community's commitment to a few key values: democratic governance, respect for fundamental rights and the rule of law, and accommodation of difference. Our commitment to these values must be renewed on every occasion, and the institutions that sustain them must be cherished. Among those institutions, I believe that Canadian courts, including the Supreme Court of Canada, play an important role.<sup>15</sup>

Despite the stated commitment to accommodating difference, some scholars argue that demands for faith-based arbitration stem from the court's inability or unwillingness to deal with religious difference. Lori Beaman, Pascale Fournier, and Irshad and Qadir Abdal-Haqq argue that the legal system is not dealing effectively with issues raised by religious minorities. They argue that minorities might avoid using the legal system because it is unresponsive to minority religious issues.<sup>16</sup>

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<sup>13</sup> John Stuart Mill, *Considerations on Representative Government*, (Reprint, Oxford: Oxford University Press, 1991), 255-256; Sylvia R. Lagos Vargas, "Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity," *Maryland Law Review* 58 (1990): 207-09.

<sup>14</sup> Vargas, 208.

<sup>15</sup> Beverly McLachlin, P.C. *The Supreme Court of Canada - Welcome*, [online]; accessed 10 June 2006; available from [http://www.scc-csc.gc.ca/Welcome/index\\_e.asp](http://www.scc-csc.gc.ca/Welcome/index_e.asp).

<sup>16</sup> Lori Beaman, "The Myth of Pluralism, Diversity and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada," *Journal for the Scientific Study of Religion*, 42, no. 3 (2003): 318; Irshad Abdal-Haqq and Qadir Abdal-Haqq, "Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States," *Journal of Islamic Law*, 1 (1996): 72; Pascale Fournier,

Although religious arbitration affects members of all faiths who seek to resolve civil disputes according to religious rules, this thesis concentrates on Muslim family law issues because the public debate has focused on Islam. McGuinty referred to it as the “debate over Shari’a law,”<sup>17</sup> even though several faiths used religious arbitration. Islam has traditionally espoused patriarchal rules that favour men over women. While the patriarchal social system is not unique to Islam by any means, women’s groups<sup>18</sup> and human rights groups<sup>19</sup> worried that Islamic leaders would use faith-based arbitration to apply discriminatory religious laws.

Several Islamic groups characterized the debate surrounding faith-based arbitration as xenophobic and Islamophobic.<sup>20</sup> The fact that the Islamic community is a growing but still relatively new group to Canada, with practices that are foreign to Judeo-Christian traditions, may also help explain why so much emphasis was placed on Shari’a arbitration. This thesis does not attempt to explain why the Islamic arbitration caused so much controversy. Since this was the most controversial aspect of the debate, the thesis focuses on concerns relating to Muslim arbitration and Muslim family issues.

Chapter Three examines judicial decisions arising from disputes over Muslim marriage contracts. The results of the analysis show that judicial treatment of religious family law contracts has been inconsistent and might discourage minorities from using

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“The Erasure of Islamic Difference in Canadian and American Family Law Adjudication,” *Journal of Law and Policy*, 10, no. 51, 2001-2002.

<sup>17</sup> Keith Leslie, “Shariah Decision Upsets Jewish Groups,” *Canoe news*. [online] (12 Sept. 2005, accessed 15 Nov., 2005); available from <http://cnews.canoe.ca/CNEWS/Politics/2005/09/11/1212487-cp.html>.

<sup>18</sup> Women’s Groups whose concerns are referred to in this thesis include the Canadian Council of Muslim Women, the International Campaign Against Shari’a Court in Canada, the National Association of Women and the Law, the Metropolitan Action Committee on Violence Against Women and Children, and the Muslim Canadian Congress.

<sup>19</sup> Human Rights Groups whose concerns are referred to in this thesis include the Legal Education and Action Fund and the International Centre for Human Rights and Democratic Development.

<sup>20</sup> These groups include the Islamic Society of North America, the Islamic Circle of North America, the Islamic Social Services Association, the Muslim Association of Canada and the Federation of Muslim Women. Ferguson, A6.

the legal system. The demand by religious minorities for legal reform, then, is something that the government and judiciary have an interest in pursuing. Chapter Four examines whether faith-based arbitration can help create change in a way that is consistent with liberal democratic principles.

The second reason McGuinty gave to justify Ontario's decision to ban faith-based arbitration is that it would be inconsistent with Canada's legal "common ground." He implied that faith-based arbitration would violate the rule of law.

The rule of law is a fundamental principle of liberal democracies. Canada should not adopt faith-based arbitration if it violates this rule. Various definitions of the rule of law canvassed in Chapter Two lend support to the argument that it does not. Faith-based arbitration may not violate the rule of law because it is subordinate to the state system and contracted into on a voluntary basis. The extent to which the process is truly "voluntary," however, has been another controversial issue in the debate.

Chapter Four focuses on concerns about the extent to which submission to religious arbitration is voluntary. Women's groups were particularly worried that religious communities would pressure women to arbitrate, and socioeconomic concerns or fear of repercussions from their families or religious community would coerce them to contract out of their secular rights.

Whether the state should enforce religious laws that discriminate on the basis of gender was a recurring topic in the debate. Faith-based arbitration highlights the tension that exists between autonomy, gender equality and cultural rights. Does accepting that culture should be protected because it forms an important part of an individual's identity require allowing the state to give political justification to cultural practices that infringe on the rights of women? Does preventing women within minority groups from

contracting out of their equality rights prevent them from acting as fully functioning citizens of a liberal democracy? If women are permitted to contract out of secular rights, how can the quality of their consent be judged? Should autonomy or gender equality prevail in the faith-based arbitration debate? Chapter Four argues that gender equality and autonomy can be reconciled by introducing safeguards to the arbitration process that educate and protect women while still allowing them to exercise their autonomy.

The reasons McGuinty gave for banning faith-based arbitration are contestable. It is not clear that “multiculturalism” demands that faith-based arbitration be banned; in fact, it could have been used to argue that it should have been supported. The discourse analysis shows that the court can treat minorities insensitively, lending support to the argument that there is a need for the government to pursue legal reform. Faith-based arbitration might be an appropriate mechanism to make the legal system more responsive to religious minorities.

Chapter Two  
Evaluating Ontario's Decision to Ban Faith-Based Arbitration

Banning Faith-Based Arbitration: A Multicultural Decision?

Premier Dalton McGuinty claimed that religious arbitration cannot be part of a cohesive multicultural society. A concrete understanding of the term “multiculturalism” is required in order to determine the accuracy of his claim, but unfortunately, it is not easily defined. “Multiculturalism” has been used to refer to government policies that give recognition to minority groups, to refer to theories of pluralism, and to describe the state of affairs where several different ethnic or cultural groups live together in the same community.<sup>21</sup> McGuinty does not specify in which context he is using the term, and a review of both the theories of pluralism and Canada’s multiculturalism policy determines that faith-based arbitration is not necessarily inconsistent with a multicultural society.

This paper uses the term “pluralism” to refer to those theories concerned with when, and to what extent, a government should institutionalize cultural diversity.<sup>22</sup> The term “polyethnic” describes the reality of several cultural or ethnic groups living within the same geographic area.<sup>23</sup> A polyethnic society is comprised of “national” and “ethnic” minorities.<sup>24</sup> “National minorities” are groups that have been incorporated into the state through “discovery” or conquest. For example, the French-Canadian and Aboriginal

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<sup>21</sup> Sarah V. Wayland, “Immigration, Multiculturalism and National Identity in Canada,” International Journal on Group Rights 5 (1997): 47; Peter S. Li, “The Multiculturalism Debate,” In Race and Ethnic Relations in Canada, 2nd ed., ed. Peter S. Li, 148-77, (Don Mills: Oxford University Press, 1999), 149; Yasmeen Abu-Laban and Daiva Stasiulis, “Ethnic Pluralism under Siege: Popular and Partisan Opposition to Multiculturalism,” Canadian Public Policy XVIII, no. 4 (1992): 367; Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, (Oxford: Clarendon Press, 1995), 10; Patrick Loobuyck, “Liberal Multiculturalism: A Defence of Liberal Multicultural Measures without Minority Rights,” Ethnicities 5, no.1 (2005):108; Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism, (Cambridge: Harvard University Press, 2001), 22.

<sup>22</sup> Barry, Culture & Equality, 23.

<sup>23</sup> This term is adopted from Kymlicka’s Multicultural Citizenship.

<sup>24</sup> Kymlicka, Multicultural Citizenship, 11.

people form Canada's two national minority groups.<sup>25</sup> "Ethnic minorities" describes those groups that have immigrated to the country.<sup>26</sup> Because this thesis emphasizes Muslim demands for faith-based arbitration, the analysis is limited to considering the way the policies and theories address the treatment of ethnic minorities.

### The History of Faith-Based Arbitration in Ontario

Legally binding faith-based arbitration occurred in Ontario from 1993 until the 2006 amendments. The *Act* was premised on the principle that parties should have the freedom to arrange their affairs as they see fit.<sup>27</sup> Arbitration was a voluntary process.<sup>28</sup> According to the *Act*, both parties had to consent to participate in the arbitration, and also had to agree on who would act as the arbitrator. The arbitrator rendered a final judgment, which was binding and enforceable in the secular courts.<sup>29</sup> Criminal matters and disputes involving third parties could not be arbitrated. Religious arbitration was normally used to resolve family law disputes about property division or child custody, but could not be used to obtain a divorce.<sup>30</sup>

Arbitrations were private procedures. The lack of public records has made it difficult to determine how frequently religious arbitrations occurred,<sup>31</sup> but there is evidence that tribunals were established. Ismaili Muslims set up arbitration tribunals,

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<sup>25</sup> *Ibid.*, 11-12.

<sup>26</sup> *Ibid.*, 11.

<sup>27</sup> Natasha Bakht, "Family Arbitration using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women," *Muslim World Journal of Human Rights*, 1, no.1 (2004): 7.

<sup>28</sup> Boyd, 13; Bakht, "Family Arbitration using Sharia Law," 3.

<sup>29</sup> Bakht, 3.

<sup>30</sup> *Ibid.*; Boyd, 13-14.

<sup>31</sup> Bunting, 9.

governed by arbitrators who were trained to understand the culturally-specific context of the dispute. Community lawyers reviewed the arbitrators' decisions *pro bono*.<sup>32</sup>

John Syrtash reported that Catholic and Anglican churches established tribunals to deal with religious marriages and annulments, but left matters of support, custody and division of property to the secular courts.<sup>33</sup> Jewish rabbinical courts were established to allow parties to seek a *ghet*, or religious release of marital obligations. The decisions released by Catholic, Anglican and Jewish tribunals that settled issues of marriage and divorce were never legally binding because arbitration tribunals do not have the jurisdiction to determine civil status.<sup>34</sup> Rabbinical courts that made decisions about child custody and property division, however, would be affected by the amendments to the *Act*. It is also possible that arbitration occurred more frequently in Christian and Jewish communities since Syrtash published his book in 1992, but the lack of public records has made this difficult to confirm.

Nothing in the amended *Act* precludes religious people from seeking advice from their leaders, and nothing prevents the resolution of family law disputes according to religious laws outside the court system. Ontario's decision to ban faith-based arbitration means these arbitrations no longer have the force of law. McGuinty stressed that this decision was necessary. His comments suggested that religious arbitration, and Shari'a law in particular, would hinder the goals of multiculturalism. The next section reviews the theories of pluralism to see whether they support Ontario's decision, and to examine the theoretical issues that arise in the faith-based arbitration debate.

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<sup>32</sup> Bakht, "Family Arbitration Using Sharia Law," 21.

<sup>33</sup> Syrtash, 101-102.

<sup>34</sup> *Ibid.*



## The Theoretical Considerations Surrounding “Multiculturalism”

Pluralist theories vary in the ways they suggest a polyethnic society should be governed. The theories of pluralism can be generally divided into two camps; “egalitarian liberalism” and the “politics of recognition.” The following discussion reviews the works of these theorists to provide an introduction to egalitarian liberalism and the politics of recognition.

The “politics of recognition” is a term coined by Charles Taylor to describe a theory of pluralism that focuses on identity and recognition. The work of Iris Marion Young, Will Kymlicka and Bhikhu Parekh are generally consistent with the politics of recognition. Brian Barry and Patrick Loobuyck write from the egalitarian liberal perspective.

The core tenets of egalitarian liberalism include the importance of the rule of law, the primacy of the individual, and the notion that special accommodation for minority practices is justified only in limited and exceptional circumstances.<sup>35</sup> Barry suggests that when multiple cultures exist within a single society, the rule of law prevents politicizing differences between cultural groups. The law must provide equal treatment for all cultures.<sup>36</sup> This raises the question of how “equality” is measured. “Equal treatment” in this sense refers to equal opportunity and the equal availability of resources. If resources have been distributed unequally in the past, the state should attempt to achieve equality by redistributing the resources equitably. For instance, if women did not have access to the education needed to successfully climb the corporate ladder, it is appropriate for the state to implement affirmative action programs until this imbalance is rectified.

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<sup>35</sup> Loobuyck, 113; Barry, Culture & Equality, 24.

<sup>36</sup> Barry, Culture & Equality, 24.

The politics of recognition defines equality as “equal respect.” Recognizing the individuality of every person is essential to recognizing their human dignity. Charles Taylor complains that egalitarian liberalism violates the principle of non-discrimination. It negates identity by forcing people into a homogenous mold which is supposedly neutral but is in fact a reflection of one hegemonic culture.<sup>37</sup> The homogenous mold is created by subjecting everyone to the same procedures and rules, and the mold that is adopted tends to favour majority groups. Young defines equality as “the [equal] participation and inclusion of all groups in institutions and positions.” This has led Barry to characterize the politics of recognition’s definition of equality as “equality of outcome.”<sup>38</sup> Egalitarian liberalism and the politics of recognition define “equal treatment” differently. Egalitarian liberal theory focuses on equality of opportunity,<sup>39</sup> while the politics of recognition focuses on giving equal respect to the value of cultural practices.<sup>40</sup> The different definitions of “equality” help explain the theories’ divergent positions on when the state should accommodate minority demands.

Egalitarian liberals argue that since the individual is the most important element in society, the most important task of a liberal government is to protect individual rights.<sup>41</sup> Egalitarian liberalism generally rejects state policies that are aimed at protecting a culture’s indefinite existence because cultures have no intrinsic value.<sup>42</sup> They are valuable only insofar as their existence is important to their individual members.<sup>43</sup> Although Loobuyck argues that the state cannot legitimately use its power to help perpetuate the

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<sup>37</sup> Taylor, 43.

<sup>38</sup> Barry, *Culture & Equality*, 92.

<sup>39</sup> Barry, *Culture & Equality*, 24; Loobuyck, 113.

<sup>40</sup> Taylor, 41.

<sup>41</sup> Barry, *Culture & Equality*, 146; Loobuyck, 113-114.

<sup>42</sup> Barry, *Culture & Equality*, 67-68.

<sup>43</sup> *Ibid.*

existence of different cultures, he does recognize that it is important for individuals to be able to access their culture.

Taylor also stresses the importance of culture to the individual. He argues that culture is critical to the formation of an individual's identity.<sup>44</sup> The way society recognizes one's cultural group is linked to the individual's self-perception. Because culture is so important to identity, he argues that people must learn about each others' cultures before they judge them as being "good" or "bad."<sup>45</sup> If the group is recognized as "bad", the individual suffers damage.

The majority often rejects cultural practices before they are sufficiently informed about the nature and importance of the practice in question.<sup>46</sup> He proposes dealing with this problem by affording each culture equal respect.<sup>47</sup> This requires understanding the traditions, values and standards of all the different groups that make up the state so that individuals feel included and understood.<sup>48</sup> Society would become more tolerant by understanding cultural differences.

Barry criticizes this argument, calling it "relativist." He argues that giving all cultures equal respect means deeming them all to be equally "good."<sup>49</sup> According to Barry, cultural relativism is dangerous because it prevents the formation of any conclusions about the desirability of cultural practices. He asserts that the principles of liberal democracies are universal; that the foundational documents of liberal democracies suggest that these principles should be followed everywhere, in every culture, because

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<sup>44</sup> *Ibid.*, 33.

<sup>45</sup> Taylor, 70-71.

<sup>46</sup> *Ibid.*, 25.

<sup>47</sup> *Ibid.*, 66.

<sup>48</sup> *Ibid.*, 70-72.

<sup>49</sup> Barry, Culture & Equality, 284.

they are right.<sup>50</sup> He explains his position with reference to the “Rushdie Affair,” an incident where Iran’s Ayatollah Khomeini pronounced a fatwa, or religious sentence, against author Salman Rushdie whose book, the *Satanic Verses*, severely offended some Muslims.

The foundational documents of liberalism are the French Declaration of the Rights of Man and the Citizen and the American Declaration of Independence. These make universalistic claims, as does, of course, the United Nations Universal Declaration of Human Rights. Thus, the correct defence of the British government’s not punishing Rushdie or handing him over to others for punishment...is not ‘This is the way we do things here.’ It is, rather, that this is the way things ought to be done everywhere: *we do things that way here not because it is part of our culture but because it is the right thing to do.*<sup>51</sup>

Parekh is critical of universalism, describing it as an ambitious, unsubstantiated philosophical claim.<sup>52</sup> He doubts that principles describing what is “good” can be validly applied to all cultures.<sup>53</sup> Taylor responds to Barry’s criticisms by denying that giving equal respect to all cultures entails finding them all equally desirable. Rather than requiring that society blindly accept all cultural practices in every instance, the politics of recognition suggests that one must learn about a culture in order to evaluate it properly. According to Taylor, non-Western cultures cannot be properly judged solely by Western standards. Society should only conclude that a practice is undesirable once it understands the reasons why it is accepted within the culture that is seeking to protect it. This ensures that society is making an informed decision.

The politics of recognition and egalitarian liberalism also differ as to where they would draw the limits of accommodation. Egalitarian liberals argue that pre-defined limits are reached when the accommodation becomes either permanent instead of

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* Emphasis mine.

<sup>52</sup> Bhikhu Parekh, “Minority Practices and the Principles of Toleration,” International Migration Review, 30, no. 1 (1996): 255.

<sup>53</sup> *Ibid.*

temporary or violates the principle of neutrality. Loobuyck defines a temporary accommodation as “that which could be repealed if it became redundant,”<sup>54</sup> but Avigail Eisenberg argues that this definition is problematic. She argues that all accommodative measures are ultimately temporary; once a minority changes its practices, accommodation is no longer needed.<sup>55</sup> “Neutrality” refers to the state giving equal recognition and treatment to all cultures, as the state can never be entirely neutral towards all cultures.<sup>56</sup> The law is “equal” because it applies to all cultures in the same way. Barry believes that a system of uniform laws is the only appropriate approach to a polyethnic society because uniform laws afford equal opportunity to all cultures.<sup>57</sup>

The politics of recognition is skeptical of this approach. It argues that implementing the same law in all situations will result in different impacts on different cultures.<sup>58</sup> For instance, a commercial Sunday-closing law impacts Saturday Sabbatarians more harshly than it impacts Christians. Barry disagrees that failure to offer special treatment in such circumstances is itself a kind of unequal treatment. Because he is defining “equality” as subjecting everyone to the same rules, inequality of impact is not a sign of unfairness.<sup>59</sup> He uses the example that laws prohibiting pedophilia or rape have a more severe impact on those who are strongly attracted to pedophilia and rape than on those who would not engage in such activities, even if they were decriminalized.<sup>60</sup> Although clearly every law is more burdensome to some people than to others, one

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<sup>54</sup> *Ibid.*, 120.

<sup>55</sup> Avigail Eisenberg, “The Limited Resources of Liberal Multiculturalism: A Response to Patrick Loobuyck,” *Ethnicities*, 5, no.1 (2005): 125.

<sup>56</sup> Barry, *Culture & Equality*, 29; Brian Barry, “How Not to Defend Liberal Institutions,” *The British Journal of Political Science* 20, (1990): 8.

<sup>57</sup> Barry, *Culture & Equality*, 32.

<sup>58</sup> Barry, *Culture & Equality*, 34.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

cannot compare the prohibition against rape and child molestation with complaints that one's cultural practices are not receiving adequate consideration by the state. While the state has an interest in outlawing assault, one of the stated goals of the Canadian government is to protect multiculturalism and minority rights. Claims that the state law cannot properly respond to cultural practices imposes a different kind of burden than laws that criminalize assault.

Barry recognizes that a system of uniform laws always gives rise to those who feel that they have been treated unfairly and who will request special accommodative measures. The government should deal with these requests by asking what merit there is in the complaint.<sup>61</sup> If the state agrees that a specific group is unduly burdened by a law, it should enact an alternative form of the law that would still meet the objectives of the original one while taking the concerns of the minority group into account. This enables the state to avoid the undesirable situation of having different rules apply to different groups within the same society.<sup>62</sup> Although this should be the state's standard practice, it is possible for a situation to arise where accommodation is defensible. For instance, as Loobuyck points out, affirmative action is an acceptable policy when it is temporarily introduced in order to improve historical disadvantage due to racism or sexism.<sup>63</sup> Usually, though, either the case for the law is strong enough to rule out the exemption, or the argument in favour of the exemption is sufficiently persuasive to suggest that the entire law should be repealed or reformed.<sup>64</sup> Exceptions to the law should rarely be granted.<sup>65</sup>

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<sup>61</sup> *Ibid.*, 32.

<sup>62</sup> Barry, *Culture & Equality*, 38-39.

<sup>63</sup> Loobuyck, 117.

<sup>64</sup> Barry, *Culture & Equality*, 39.

<sup>65</sup> *Ibid.*, 62.

There is no consensus within the politics of recognition concerning the limits of accommodation. Kymlicka recommends different limits for national and ethnic minority groups. Because ethnic minorities normally emigrate voluntarily, they implicitly agree to abide by the laws of the new country. Cultural authorities should not be permitted to impose on the individual secular rights of their members. Kymlicka opposes religious arbitration for Muslims on these grounds.<sup>66</sup>

Parekh and Taylor would define limits on a case-by-case basis. Parekh supports collective rights because they may protect certain rights, like a community's right to its culture or language, more effectively than if the rights were held by individuals alone.<sup>67</sup> Not every cultural practice should be tolerated, however; when cultural practices conflict with the practices of the majority, limits should be defined through a "democratic dialogue." The minority party would explain why the practice is important to its culture and would respond to governmental concerns about that practice. The government would then evaluate whether these responses are persuasive enough to justify accommodating the minority practice. This debate is termed "transformative" because it gives an opportunity to both the majority and the minority cultures to identify and re-examine common values and interests.<sup>68</sup> Taylor's view is similar. He suggests that the majority may validly decide that a practice is unacceptable if it is evaluated through standards informed by the culture from which it originated.<sup>69</sup>

The democratic dialogue, or variations thereof, is a prevalent theme in the politics of recognition. Young, Taylor and Parekh all argue that minorities should use the

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<sup>66</sup> Kymlicka, *Multicultural Citizenship*, 42.

<sup>67</sup> Parekh, *Rethinking Multiculturalism*, 217.

<sup>68</sup> Parekh, "Minority Practices and the Principles of Toleration," 261.

<sup>69</sup> Taylor, 72.

democratic process to define the norms and values of the society they inhabit. Young proposes a model of “deliberative democracy,” whereby all those who are affected by governmental decision-making would have the opportunity to express their different positions and challenge the position of others through a democratic dialogue. Each group would have the opportunity to attempt to persuade others of the merit of their claims, and the opinions of all those who participate could potentially be changed by the process.<sup>70</sup> Parekh suggests that the best way of coming to a decision on whether to allow minority practices that may differ from society’s traditional values is through “an open-minded and morally serious dialogue with [a] minority spokesman and to act on the resulting consensus.”<sup>71</sup>

The democratic dialogue theory is in line with the democratic ideal that all members of society should play a role in shaping the polity’s views. There is debate among scholars, however, about the extent to which religious discourse should form part of this democratic dialogue. Robert Audi argues that including religious citizens in the discourse as much as possible helps “secure the vitality of a free democracy.”<sup>72</sup> He argues that “we should try to cultivate a civic voice that reflects respect for others of differing views and a commitment to certain shared...standards that are not dependent on any religious commitments or points of view.”<sup>73</sup> Steven Shiffrin agrees, stating “it would be peculiar to suppose that we want uninhibited, robust, wide-open debate *except* when religious principles are involved.”<sup>74</sup>

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<sup>70</sup> Iris Marion Young, Inclusion and Democracy, (Oxford: Oxford University Press, 2000), 6.

<sup>71</sup> Parekh, Rethinking Multiculturalism, 255.

<sup>72</sup> Robert Audi, “Religious Values, Political Action, and Civic Discourse,” Indiana Law Review 75 (2000): 275.

<sup>73</sup> *Ibid.*, 294.

<sup>74</sup> Steven Shiffrin, “Religion and Democracy,” Notre Dame Law Review 74 (1998-1999): 1645.



According to Audi, religious discourse is acceptable as long as there are other, secular reasons for one's position on public issues.<sup>75</sup> Shiffrin disagrees, arguing that while the state should be free from an established church, a plural society should include religion and religious individuals, and allow them to weigh in on controversial public questions even if religious beliefs motivate their reasons.<sup>76</sup> This is an important consideration for religious minorities who propose the use of faith-based arbitration, because it would require public officials to recognize and enforce religious laws.

The debate over the extent to which religious dialogue is acceptable in the public sphere extends to the courtroom. Chief Justice Beverly McLachlin notes that the court provides the forum for public discourse. "Courts offer a venue for the peaceful resolution of disputes, and for the reasoned and dispassionate discussion of our most pressing social issues."<sup>77</sup> Rawls suggests that political questions are generally solved with reference to public reason, and the court is the "exemplar of public reason."<sup>78</sup> Unlike the executive or legislative branches, the judiciary must justify and explain its reasons according to constitutional principles and its interpretation of statute and common law.<sup>79</sup> It is important to include minority perspectives in this forum.

...the Court's failure to include and engage minority perspectives in constitutional adjudication cases means that minorities are not meaningfully included in the dialectic of formulating the substantive values of the polity, thereby threatening both the stability and legitimacy of the institution.<sup>80</sup>

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<sup>75</sup> Audi, 277.

<sup>76</sup> Shiffrin, 1656.

<sup>77</sup> Beverly McLachlin, *The Supreme Court of Canada: Welcome*, [online]; accessed 10 June 2006, available from [http://www.scc-csc.gc.ca/Welcome/index\\_e.asp](http://www.scc-csc.gc.ca/Welcome/index_e.asp).

<sup>78</sup> John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), 216.

<sup>79</sup> *Ibid.*, 216.

<sup>80</sup> *Ibid.*, 209.

Pascale Fournier focuses on the role of the court in her “functional approach.”<sup>81</sup> She argues that the court must be educated as to religious beliefs in order to be sensitive to their differences. The court should take a contextual approach to resolving disputes of religious minorities by examining the importance of the beliefs to the parties’ on a case-by-case basis.<sup>82</sup> This approach would help resolve perceptions that the court is insensitive to religious minorities, and is discussed more thoroughly in Chapter Three.

Sylvia Vargas argues that the court should treat all citizens as equal participants in the democratic dialogue.<sup>83</sup> Religious minorities cannot help define Canadian norms and values unless they are included in the dialogue. The way that the court defines religious minority beliefs impacts their identity as Canadian citizens. Parekh defines “identity” as “the chosen or inherited characteristics that define [individuals] as certain kinds of persons or groups and form an integral part of their self-understanding.” These characteristics result in “identity-related differences.”<sup>84</sup> Taylor argues that there is a link between recognition and identity; individuals form their own identity through dialogue. Identity is crucially dependent on the way that one is perceived by others.<sup>85</sup>

The concept of religion as identity is problematic. Religion can be both an individual choice and a culture into which one was born and raised.<sup>86</sup> A religion’s claim to explain the “truth” of the divine implies a choice to believe on the part of its adherents.<sup>87</sup> While some would argue that the decision to belong to a religion is a choice, others would argue that religion is part of the culture that an individual is born into. If

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<sup>81</sup> Fournier, 68.

<sup>82</sup> *Ibid.*, 69.

<sup>83</sup> Vargas, 207.

<sup>84</sup> Parekh, Rethinking Multiculturalism, 1.

<sup>85</sup> Taylor, 34.

<sup>86</sup> Richard Moon, “The Imposition of Religion,” Prepared for the Religion and Citizenship Conference, held at the University of Windsor, Faculty of Law, May 5-6, 2006 (Publication Pending), 1.

<sup>87</sup> Moon, 2.

religion can form part of one's culture, religion can form part of an individual's identity without that person having made the choice to belong to the religion.<sup>88</sup> Religious claims, then, may or may not be about identity.

To complicate matters further, whether a question of religion is important to one's identity can be subjective. The state must accept the assertions of an individual who claims that a religious issue is important to his or her identity, since it is the individual who decides what constitutes his or her identity.<sup>89</sup> The same religious demand might be identity-related for one person and not for another. For instance, it might depend on the perceived importance of the religious obligation, or on the depth of the individual's religious devotion.

The state seems to be more willing to accommodate demands related to identity than those that stem from association that is a personal choice. This may be because the denial of a demand based on an individual's identity seems to equate to a denial of his or her equal worth.<sup>90</sup>

The concept of religion as identity is complex, and space constraints prevent a full consideration of this discussion. For the purposes of the matter at hand, this thesis assumes that at least some of the individuals who seek to resolve family disputes according to religious laws feel that their religion is a constitutive part of their identity. Therefore, this thesis proceeds under the assumption that the state's acceptance or rejection of requests for faith-based arbitration can impact an individual's feeling of equal worth within the state. If religion forms part of one's identity, requests for

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<sup>88</sup> *Ibid.*

<sup>89</sup> Avigail Eisenberg, "Identity and Liberal Politics: the Problem of Minorities within Minorities." In Minorities Within Minorities: Equality, Rights and Diversity, eds. Avigail Eisenberg and Jeff Spinner-Halev, 249-270. (Cambridge: Cambridge University Press, 2005), 263.

<sup>90</sup> Moon, 24.

accommodative treatment based on religious belief results in “identity-related differences.” The religious minority who is seeking faith-based arbitration is seeking recognition of religious differences that relate to their personal identity.

Chapter Three looks at whether the legal system acknowledges these identity-related differences, and whether they are described or categorized in a way that reinforces the supremacy of majority beliefs, or whether minority demands are taken seriously and recognized as equally important. The judges determine whether the beliefs or demands are recognizable by the legal system, if they are consistent with Canadian values, and if they are worthy of accommodation. The way judges arrive at these decisions, the reasoning they employ, the language they use, and ultimately the final decision impacts the way that the legal system and society at large perceives the religious minorities.

If we accept that religious identity is important for the individual, the way the legal system treats religious demands impacts on the way the individual members see themselves. This debate must also consider minorities within society’s religious minorities. The debate over faith-based arbitration centered around women’s rights. The National Association of Women and the Law argue that patriarchal religious beliefs have the potential to harm women by favouring men, giving them a greater right to property or custody.<sup>91</sup> The law, they argue, could not enforce religious laws that violate the right to gender equality. One might argue, however, that as long as the woman has a right to exit her culture if she does not agree with its rules, the state could enforce these rules.

Both egalitarian liberalism and the politics of recognition argue that individuals must have the right to leave his or her culture, or “a right of exit.” Loobuyck argues that the right of exit prevents the state from granting cultural rights that may infringe on this

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<sup>91</sup> Boyd, 32.

right.<sup>92</sup> Some theorists use this to justify the state protection of cultural practices. Under this view, the right to exit is an important element for individuals to decide to engage in cultural practices because they have the choice to leave that culture if they do not accept its rules.<sup>93</sup> The opposing view is that gender equality should take precedence over cultural rights. The right of exit is not enough to justify the state condoning illiberal practices.<sup>94</sup>

Those women whose identity is formed, at least in part, by their religion are disadvantaged because they are pressured to either reject their religious identity in favour of gender equality or be put at the mercy of religious leaders who wish to enforce a patriarchal belief system.

The feminist critique is skeptical about giving cultural or religious authorities too much control over their members, arguing that such an approach does not adequately protect marginalized members within the group. This critique urges scholars to pay attention to the power relations inside a group and their struggles over the “authentic” interpretation of cultural or religious doctrine, which may be conservative and discriminatory towards women.<sup>95</sup> They argue that women in illiberal groups may not be given a sufficiently strong voice in the democratic dialogue. For instance, one of the reasons feminists have opposed faith-based arbitration is that the religious authorities are almost always men, and consequently Islamic arbitration tribunals will most likely reflect a patriarchal interpretation of Islam.

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<sup>92</sup> Loobuyck, 114.

<sup>93</sup> Jeff Spinner-Halev, “Autonomy, Association and Pluralism,” In Minorities Within Minorities: Equality, Rights and Diversity, eds. Avigail Eisenberg and Jeff Spinner-Halev, 157-171. (Cambridge: Cambridge University Press, 2005), 159-61.

<sup>94</sup> Eisenberg, “Identity and Liberal Politics,” 253.

<sup>95</sup> Ayelet Shachar, “Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies,” McGill Law Journal, 50 (2005): para. 14.

Denise Reaume and Ayelet Shachar have attempted to reconcile these problems through practical models based on the democratic dialogue theory. Reaume suggests a type of cultural self-government where the group is given decision-making abilities on a limited range of issues. According to this model, the state would give cultural groups the right to govern over some affairs but retain control over others. For instance, the cultural group might retain control over defining its membership. The state should not attempt to redefine a community by forcing them to include those they would otherwise exclude, or vice versa.<sup>96</sup> She states that this model is best suited to those groups that hold a world view that differs only marginally from that of the majority society.<sup>97</sup>

Reaume's model does not specify how society would determine if the minority group's world view differs from the majority in a way that is "significant" but only in a "relatively narrow manner" as to qualify for this type of government. Her principles to be followed when determining if a culture can be autonomous are vague. The first principle is that "cultural autonomy should be respected unless its exercise in a particular case is repugnant to justice."<sup>98</sup> How does one determine whether a practice is repugnant to justice? She explains, "The repugnancy proviso should be regarded as setting a serious threshold – only if a practice is sufficiently unjust to cross this threshold should the law intervene...The threshold cannot be defined with any precision..."<sup>99</sup> These principles do not give any instruction about how to make such determinations. Furthermore, they are susceptible to being interpreted in accordance with the unconscious racism or unexamined assumptions of the majority. It makes little sense to ask society to determine

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<sup>96</sup> Denise G. Reaume, "Legal Multiculturalism from the Bottom Up," in *Canadian Political Philosophy*, eds. Ronald Beiner and Wayne Norman (Don Mills: Oxford University Press, 2000), 198-99.

<sup>97</sup> *Ibid.*, 202.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*, 204-205.

whether a practice is “repugnant to justice” if the problem lies in the majority unfairly judging minority practices.

Shachar advocates the “joint-governance model” to achieve cooperation between the state and the cultural group. She is critical of giving exclusive jurisdiction to either the state or the group because members of minority groups have a national as well as a cultural identity. Neither the state nor the culture can adequately protect both identities, so a system of cooperation is necessary.<sup>100</sup> The joint-governance model would divide jurisdiction over some legal issues between state and cultural authorities. Sharing jurisdiction would give minorities within groups the ability to appeal to whichever authority would best protect them.<sup>101</sup> She uses the Islamic arbitration tribunals as an example of the joint-governance model, stating that the tribunals would be acceptable provided they be altered to include more protection for minorities, such as a requirement to receive independent legal advice.<sup>102</sup> In terms of religious arbitration, she suggests a mandatory review of all arbitration settlements, where the judge would ensure that the decision was made with consent and in accordance with the beliefs of the parties.<sup>103</sup> This system would create an incentive for religious groups to implement their religious values in a way that the court would not later over-turn.<sup>104</sup>

This model recognizes that there is merit in allowing cultural and religious minorities to control certain affairs relating to their identity, but instead of dividing jurisdiction so that either the group or the state makes the final decision, sharing

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<sup>100</sup> Ayelet Shachar, “Should Church and State be Joined at the Altar? Women’s Rights and the Multicultural Dilemma,” in *Citizenship in Diverse Societies*, eds. Will Kymlicka and Wayne Norman, (Oxford: Oxford University Press, 2000), 218.

<sup>101</sup> Shachar, “Religion, State and the Problem of Gender,” at para. 39.

<sup>102</sup> *Ibid.*, at para. 47.

<sup>103</sup> *Ibid.*, at paras. 49-50.

<sup>104</sup> *Ibid.*, at para. 51.

jurisdiction avoids giving either group exclusive control over the outcome.<sup>105</sup> This model addresses the fact that a change in civil family status can affect one's membership status within a group, so it makes sense for the person being affected by these decisions to be able to defer to a cultural or religious authority on these issues as well.<sup>106</sup>

Shachar's model depends on cooperation between the state and the cultural or religious authorities to be effective. Problems might arise in determining which circumstances, if any, the state would refuse to share jurisdiction with a group. When could the state withhold this devolution of power? Would cultural groups be at the mercy of the state to decide to share jurisdiction? What if the religious or cultural authorities refused to accept the joint authority of the state?

France's governing doctrine of *laïcité* is an example of the egalitarian liberal theory put into practice. *Laïcité* is comprised of the principles of freedom of religion, equal respect and state neutrality.<sup>107</sup> It dictates that the state should be entirely secular, and state institutions should not promote any religion. France used this doctrine to ban any portrayal of religious affiliation in public schools, which includes banning Muslim women from wearing the hijab because it is a sign of religious allegiance.<sup>108</sup> This rule has been the cause of significant controversy, with several Muslims reporting that they feel unfairly ostracized from French society by the rule.<sup>109</sup> This illustrates a weakness with egalitarian liberal theory. It can promote facial equality by subjecting all members of society to the same rules, regardless of outcome, which can make minorities feel

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<sup>105</sup> Shachar, "Should Church and State be Joined at the Altar?," 218.

<sup>106</sup> Shachar, "Religion, State and the Problem of Gender," at para. 73.

<sup>107</sup> Cécile Laborde, "Secular Philosophy and Muslim Headscarves in Schools," *The Journal of Political Philosophy*, 13, no.3 (2005): 306.

<sup>108</sup> *Ibid.*

<sup>109</sup> ---- "French Muslims fear 'state within a state,'" BBC News, 02 Dec. 2004 [online newspaper]; accessed 15 Nov. 2005; <http://news.bbc.co.uk/2/hi/europe/3482641.stm>.



ostracized. The politics of recognition, then, may be seen as more favourable to minority cultures.

This admittedly brief review of the theories of pluralism indicates that there is no one dominant, consistent theory of multiculturalism. This division of theorists into two competing schools is not meant to ignore the variation that exists within each, but the overview is sufficient for the purpose of this research. Either banning or accepting faith-based arbitration could be justified by “multiculturalism,” depending on which theory the government subscribes to. Although there is no theoretical consensus about what “multiculturalism” requires in this situation, Ontario’s reliance on “multiculturalism” as a decision to ban faith-based arbitration may be justifiable if Canada’s multiculturalism policy tells the government how it should respond to demands for faith-based arbitration. The next section examines whether Canadian institutions have offered a clearer definition of what “multiculturalism” means in Canada.

### Multiculturalism in Canada

Pierre Trudeau introduced Canada’s multiculturalism policy in 1971. Kymlicka argues he did so without any well-developed underlying theory or long-term strategy for implementation.<sup>110</sup> Some have accused the Liberal party of passing the policy just to attract minority votes.<sup>111</sup> Neil Bissoondath criticizes the *Multiculturalism Act*<sup>112</sup> as being

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<sup>110</sup> Will Kymlicka, *Finding our Way: Rethinking Ethnocultural Relations in Canada*, (Toronto: Oxford University Press, 1998), 40; Li, 149.

<sup>111</sup> Li, 152; Wayland, 47.

<sup>112</sup> *Multiculturalism Act*, R.S. 1985, c. 24 (4<sup>th</sup> Supp.).

devoid of principles; it does not communicate any long-term plan for the country, nor does it identify what Canada is aspiring to achieve through the legislation.<sup>113</sup>

Kymlicka is less critical. He describes the multiculturalism policy as one which is aimed at reducing the pressure on immigrants to assimilate.<sup>114</sup> The pressure to assimilate might be greater for some groups than others, and might differ depending on the prevalent attitudes towards immigration. Kymlicka's description suggests that the multiculturalism policy is sufficiently flexible to reflect the changing pressure on minority groups. Patricia Roy agrees that the policy is flexible, and offers evidence of its evolution over time as proof. The policy's initial focus was the promotion of cultural expression, and has since evolved to focus on eliminating racial discrimination.<sup>115</sup>

While Bissoondath argues that the policy does not define what a successful multicultural society is,<sup>116</sup> T. John Samuel and Dieter Schachhuber suggest that the goal of multiculturalism in Canada is "to ensure full participation and full contribution by all Canadians."<sup>117</sup> Samuel and Schachhuber's definition accords with the federal government's definition of multiculturalism as allowing citizens to keep their cultural identities and feel a sense being Canadian at the same time.<sup>118</sup>

The literature demonstrates that there is more agreement about what multiculturalism in Canada should achieve than about how it should be achieved. The

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<sup>113</sup> Neil Bissoondath, "A Question of Belonging: Multiculturalism and Citizenship," in Belonging: The Meaning and Future of Canadian Citizenship, ed. William Kaplan, (Montreal & Kingston: McGill-Queen's University Press, 1993), 372.

<sup>114</sup> Kymlicka, Finding our Way, 40.

<sup>115</sup> Patricia E. Roy, "The Fifth Force: Multiculturalism and the English Canadian Identity," The Annals of the American Academy, 538, no.1 (1995): 201.

<sup>116</sup> Bissoondath, 372.

<sup>117</sup> T. John Samuel and Dieter Schachhuber, "Perspectives on Canadian Diversity," in 21<sup>st</sup> Century Canadian Diversity, ed. Stephen E. Nancoo, (Mississauga, Educator's Press, 2000), 32.

<sup>118</sup> Department of Canadian Heritage, "What is Multiculturalism?" [online]; accessed 09 Aug. 2006; available from [http://www.canadianheritage.gc.ca/progs/multi/what-multi\\_e.cfm](http://www.canadianheritage.gc.ca/progs/multi/what-multi_e.cfm).

policy itself does not set out clear guidelines about how Canada should achieve its goals and its substance is unclear. The literature highlights the nebulous character of the multiculturalism policy.

Kymlicka's work refers to specific policies that are often labeled as "multicultural policies," but his discussion is not limited to policies that have actually been enacted in Canada. He prefers to focus on how both real and proposed policies might help immigrants integrate into Canadian society.<sup>119</sup> Romulo Magsino attempts to formally identify Canada's policy. He asserts that it demonstrates a consistent commitment to "equality," and reasons that equality is an underlying principle of pluralism in Canada. He defines it as "having access to what one justly deserves as a human being."<sup>120</sup> He does not, however, specify how "equality" is measured, and so how "equality" influences Canadian policy remains unclear. Does "equality" refer to equality before the law, equality of opportunity, or some other measure? Neither Magsino nor Kymlicka elaborates on whether Canada adheres to egalitarian liberalism or the politics of recognition.

Peter Li examines the policy in an attempt to explain the confusion surrounding the concept of "multiculturalism."<sup>121</sup> He begins by outlining the *Multiculturalism Act's* ten objectives:

- (1) to acknowledge the freedom of cultural choice for all Canadians;
- (2) to recognize and promote multiculturalism as a fundamental characteristic of Canada;
- (3) to promote full and equitable participation of individuals and communities of all origins;
- (4) to enhance the development of communities sharing a common origin;
- (5) to ensure equal treatment and protection for all individuals while respecting their diversity;
- (6) to encourage and assist social institutions to be respectful and inclusive of Canada's multicultural character;
- (7)

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<sup>119</sup> Kymlicka, *Finding our Way*, 42.

<sup>120</sup> Romulo F. Magsino, "The Canadian Multiculturalism Policy: A Pluralist Ideal Re-Visited," in *21<sup>st</sup> Century Canadian Diversity*, ed. Stephen E. Nancoo, (Mississauga: Canadian Educators' Press, 2000), 328.

<sup>121</sup> Li, 148.

to promote the understanding from intergroup interactions; (8) to foster the recognition and appreciation of diverse Canadian cultures; (9) to preserve and enhance non-official languages while strengthening the official languages of Canada; and (10) to advance multiculturalism in harmony with the commitment to official languages.<sup>122</sup>

He then quickly touches on the establishment of the Department of Multiculturalism and Citizenship in 1990, the budget of the Department in 1991 and 1992, and its eventual relegation to a branch under the department of Canadian Heritage in 1994.<sup>123</sup> He does not, however, conduct a thorough examination of the contents of the policy. The ten objectives are vague, and as such they cannot provide clear guidance to the government when it is faced with a difficult situation like faith-based arbitration. Both the opponents and proponents of faith-based arbitration could argue that their opponents are being inconsistent with these objectives. For example, opponents of faith-based arbitration could argue that the objective “to ensure equal treatment and protection for all individuals while respecting their diversity” would require that the government protect the minorities within the religious groups who could be exploited in the faith-based arbitration process. Proponents could argue that the objectives of promoting “full and equitable participation of individuals and communities of all origins,” or “to encourage and assist social institutions to be respectful and inclusive of Canada’s multicultural character” require the establishment of religious arbitration tribunals in order to fully include minorities in the legal institution.

It is possible that a thorough review of the substance of Canada’s multiculturalism policy has not been conducted because it permeates through several policy areas. In addition, although the government has produced a plethora of documentation referring to

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<sup>122</sup> *Ibid.*, 155-56.

<sup>123</sup> *Ibid.*, 157-58.

“multiculturalism,” there is no single document that outlines the substance of the policy. If this is the case, it may not be accurate to define Canada’s multiculturalism policy in concrete terms.

Where Canada’s multiculturalism policy draws the limits of accommodation is unclear. Bissoondath suggests that the policy leaves no room for limits; the philosophy of the policy names everything cultural as sacred, and because it is sacred, society must accommodate itself to every display of cultural life.<sup>124</sup> He gives three examples of practices whose accommodation might be demanded in the name of multiculturalism; religious arbitration, female genital mutilation and the Hindu practice of *Suttee*, where a widow commits suicide by burning herself alive on her husband’s funeral pyre.<sup>125</sup> Although his use of these examples is theoretical, to lump them together as if they can appropriately be compared against one another is misleading. It is inappropriate to compare Muslim demands for religious arbitration with practices that result in irreversible physical mutilation or death, and highlights the need to examine how faith-based arbitration would work in practice before jumping to dramatic conclusions about its effects on women. Like Bissoondath, Kymlicka groups the requests for religious arbitration and requests to perform clitoridectomies together as examples of the types of demands that are made in the name of multiculturalism.<sup>126</sup> The degree of harm caused by genital mutilation and the degree of harm caused by allowing parties to come to a consensus about property division based on religious beliefs is quite different, and lumping them both together may give readers the false impression that the degree of harm caused by both practices is comparable.

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<sup>124</sup> Bissoondath, 380.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

Kymlicka disagrees that the logic of Canada's policy dictates that all minority practices have to be tolerated.<sup>127</sup> He would reject Muslim requests for faith-based arbitration because it would hinder the group's integration into Canadian society by decreasing their participation in mainstream social institutions. He also notes its potential to infringe on human rights.<sup>128</sup> Kymlicka believes that giving groups the option to conduct religious arbitration would affect political participation or integration into mainstream society. This assumption is examined throughout this thesis. Contrary to his assumption, if religious minorities feel that they are not being treated fairly in the secular court system, they may defer to cultural authorities and reject the legal system entirely. Integration and political participation could be affected if minorities feel that the legal system is not "neutral" and cannot recognize their claims.

The multiculturalism policy and its objectives are national, while faith-based arbitration and the establishment of a judicial system is under provincial jurisdiction. Ontario does not currently have a well-developed multiculturalism policy or multiculturalism legislation. "Multiculturalism" in the province is currently subsumed under the Ministry of Immigration and Citizenship, and it is not the primary focus of the ministry. The absence of a defined provincial policy, and McGuinty's comment that Ontario "supports policies that support multiculturalism," supports the inference that Ontario would follow the federal multiculturalism framework. This literature review illustrates that there is no agreement about the content, direction, goal or requirements of the federal multiculturalism policy. The government's commitment to multiculturalism, then, does not necessarily dictate that faith-based arbitration be rejected.

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<sup>127</sup> Kymlicka, Finding our Way, 65.

<sup>128</sup> *Ibid.*, 43.

If faith-based arbitration violates the rule of law, however, Ontario's decision might be justified. Canada is committed to the rule of law. A legal mechanism that violates this rule would be unacceptable.

### The Rule of Law and Faith-Based Arbitration

Ontario's decision to ban faith-based arbitration was based, in part, on the view that the law should apply equally to everyone. McGuinty stated, "the notion of binding religious (tribunals) is inconsistent with one law for all Ontarians."<sup>129</sup> One might argue, however, that faith-based arbitration does not violate the rule of law.

Dicey defined the rule of law as having two components: "equality before the law," which means that state officials are not above the law, and the supremacy of "regular law," or state law, over "arbitrary power." The rule of law means laws must be fairly enacted, enforced, made available to the public and apply equally to state officials.<sup>130</sup> Other scholars have defined the rule of law more broadly. T.R.S. Allen suggests that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law.<sup>131</sup> Peter Hogg and Cara Zwibel define the rule of law as having three elements; "(1) a body of laws that are publicly available, generally obeyed, and generally enforced; (2) the subjection of government to those laws (constitutionalism); and (3) an independent judiciary and legal profession to resolve disputes about those laws."<sup>132</sup> According to these definitions, allowing parties to contract out of secular law in family disputes does not necessarily violate the rule of law. None of

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<sup>129</sup> Ferguson, A5.

<sup>130</sup> Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada," University of Toronto Law Journal 55, no. 3 (2005): 715-16.

<sup>131</sup> *Ibid.*, 716.

<sup>132</sup> *Ibid.*, 718.

these definitions specify that the rule of law requires every person to be subject to identical laws in every instance.

These definitions suggest that the government could uphold the rule of law while recognizing legal pluralism. A social scientific view of legal pluralism is not inconsistent with the rule of law. John Griffiths distinguishes between “juristic legal pluralism” and the “social scientific view of legal pluralism.” Juristic legal pluralism occurs when the state’s legal system applies different bodies of law to different ethnic or religious groups within the state. This would appear to violate the rule of law.

The social scientific view of legal pluralism focuses on the reality that different laws exist within society, and the state laws are simply one of many types of laws.<sup>133</sup> The two differ to the extent that the state institutionalizes legal pluralism. Any debate about faith-based arbitration, then, should consider the extent to which it institutionalizes a social scientific view of legal pluralism, or whether it violates the rule of law by holding individuals to different laws based on ethnic or religious affiliation. This subject is discussed in more detail in Chapter Four.

Just as the theories of pluralism and multiculturalism policies do not necessarily dictate that the government must reject faith-based arbitration, it is not clear that faith-based arbitration violates the rule of law.

#### Treatment of Minorities within the Legal System

One might argue that multiculturalism requires examining why demands for faith-based arbitration exist in the first place. Accommodative measures are warranted if the legal system is somehow unjust towards religious minorities. Considering why demands

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<sup>133</sup> Sally Engle Merry, “Legal Pluralism,” Law & Society Review, 22, no. 5 (1988): 871.



for religious arbitration exist in the first place would help determine whether the legal system is somehow intrinsically unfair to minority religious groups.

Examining the role of state institutions in creating minority demands is consistent with the “historical institutional” approach. While egalitarian liberalism and the politics of recognition focus primarily on how to respond to minority demands, historical institutionalism focuses on why these demands exist in the first place. The historical institutional approach studies how a state’s institutions contribute to minority groups’ identities and their demands for accommodation.

Historical institutionalism treats the political institutions as a variable that affects political outcomes.<sup>134</sup> It assumes that policies develop from a variety of unexpected actors and events rather than from a logical sequence of strategic decisions.<sup>135</sup> Historical institutionalism defines “institutions” as “the rules of electoral competition, the structure of party systems, the relations among various branches of government, and the structure and organization of economic actors like trade-unions.”<sup>136</sup> It studies how political institutions influence the interests and preferences of its citizens.

Historical institutionalism can be contrasted with the cultural approach, which attempts to interpret the meaning of cultural identities and to suggest strategies to deal with their claims rather than to explain how the claims are created and made politically relevant.<sup>137</sup> The cultural approach views minority requests for accommodation as an attempt to protect cultural differences. It takes as a matter of fact that cultural differences exist, and that demands made by cultural groups stem from particular cultural traits.

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<sup>134</sup> *Ibid.*, 511.

<sup>135</sup> *Ibid.*, 512; Ellen M. Immergut, “The Theoretical Core of the New Institutionalism,” *Politics & Society*, 26, no.1 (1998): 19.

<sup>136</sup> *Ibid.*

<sup>137</sup> André Lecours, “Theorizing Cultural Identities: Historical Institutionalism as a Challenge to the Culturalists,” *Canadian Journal of Political Science*, XXXIII, no. 3 (2000): 500.

Historical institutionalism, on the other hand, focuses not only on whether institutional rules disadvantage immigrant groups and help create claims for accommodation, but also looks at how institutional symbols and rules affect a culture's self-perception. The institutions themselves may have a hand in creating the identity of the group. Historical institutionalism is a useful approach to studying the demands for faith-based arbitration because it focuses on which groups hold power in society and attempts to identify biases inherent in political institutions.<sup>138</sup>

Some scholars have identified the principles embedded in historical institutionalism without directly engaging this approach. Shachar invokes the principles of historical institutionalism when she argues that fears of assimilation can drive cultural leaders to impose strict behavioural rules on women.<sup>139</sup> The way the state responds to cultural differences can exacerbate or lessen them.

The literature in this area supports the historical institutional approach by suggesting that one reason religious minorities demand faith-based arbitration is that they feel excluded from Canada's legal institutions. Bunting notes that Muslims support alternative dispute resolution because they are afraid that their religious beliefs would not be respected or upheld in the secular court.<sup>140</sup> Minority religious groups may also fear that society is prejudiced towards their way of life. They may feel that the larger society feels that their religious convictions are "a sign of intellectual or psychological weakness and brainwashing."<sup>141</sup>

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<sup>138</sup> *Ibid.*, 513-14.

<sup>139</sup> Shachar, "Should Church and State be Joined at the Altar?," 202.

<sup>140</sup> Bunting, 6.

<sup>141</sup> Lois Sweet, "Accommodating Religious Difference: The Canadian Experience," In *Possibilities and Limitations: Multicultural Policies and Programs in Canada*, ed. C. E. James, 130-153. (Black Point: Fernwood Publishing, 2005), 139.

The court system may be inadequate for dealing with Islamic issues for “reasons ranging from hostility and ignorance to jurisprudential and constitutional restraints.”<sup>142</sup> This may be, in part, because Islamic values are still relatively new and “foreign” to Canadian law. Christianity is easily the dominant religion in Canada, with over 80% of Canadians identifying with the Christian religion in 1993.<sup>143</sup> Lori Beaman points out that a consequence of the Roman Catholic and Protestant religious hegemony is that the interpretation of what is “normal” in terms of religious belief is made in comparison to Protestant and Catholic norms.<sup>144</sup>

Beaman’s study looks at four categories of religious minority groups that seek to protect their practices under the freedom of religion. She cites the Supreme Court case *Bhinder v. C.N.*<sup>145</sup> as an example of how the court treats groups in the “immigrant religion” category. In this case, a Sikh man requested an exemption from wearing a hard hat at work because he felt he had a religious obligation to wear his turban at all times. His claim was ultimately rejected. Beaman notes,

In cases like *Bhinder*, the courts displace the individual from the group and are thus able to ignore the widespread impact of discriminatory legislation. The individual is constructed as an ‘exception’ who is seeking special dispensation for exemption from what is inevitably characterized as a ‘sensible’ rule.<sup>146</sup>

When compared to Western values, the turban becomes nothing more than a hat, and the requirement that it be removed for work is seen as a reasonable request. Beaman’s argument would be strengthened by going beyond this single case and examining a larger sample of cases, as well as more recent cases, involving claims by religious minorities.

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<sup>142</sup> Abdal-Haqq, 72.

<sup>143</sup> Roger O’Toole, “Religion in Canada: Its Development and Contemporary Situation,” *Social Compass*, 43, no.1 (1996): 122.

<sup>144</sup> Beaman, 318.

<sup>145</sup> *Bhinder v. C.N.*, [1985] 2 S.C.R. 561.

<sup>146</sup> Beaman, 320.

Examining the construction of religious minority requests in family law cases is particularly useful, because faith-based arbitration generally deals with family law disputes. Now that faith-based arbitration is not legally recognized, parties must resolve their issues according to secular legislation in order for the decision to be legally binding. It is worth looking at how court decisions treat religious minorities and their claims. The historical institutional approach lends support to the argument that these decisions might contribute to demands for faith-based arbitration.

The way the court handles minority claims contributes to whether they feel included in Canadian society. John Rawls argues that a stable democracy includes each of the polity's members. Inclusion helps create stability by allowing minority groups to believe that "the polity's fundamental terms can fulfill their aspirations and acknowledge their sense of self."<sup>147</sup>

Polyethnic societies contain several, often competing, world views and moral perspectives. Being sensitive to these differing perspectives increases the legitimacy of the legal system. "The Court's legitimacy in a democratic polity depends on its ability to claim that it is neutral, and that it attempts in good faith to interpret principles of justice for the well-being of all social groups." Tom Tyler suggests that minorities are more likely to accept the authority of the legal system if they perceive it as being able to take their different perspectives into account, even if the judicial outcome is not in their favour.<sup>148</sup> If the legal system is not seen as being procedurally fair when competing moral issues arise, the legal system loses legitimacy.

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<sup>147</sup> Vargas, 208.

<sup>148</sup> Tom R. Tyler, "Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities," *Law & Social Inquiry*, 25, no. 4 (Autumn 2000): 1014.

Tyler suggests that it is important that the courts communicate respect in order for those minorities to feel included in society, to accept the legitimacy of the legal system and to feel a sense of belonging. Since the court acts as an agent of the state, its decisions are seen as emanating from the state. The court would ideally promote multiculturalism, then, by engaging in an inclusive dialogue that considers society's divergent opinions. If the court does not adequately consider minority views, it would hinder multiculturalism's goal of inclusion.

### Conclusion

Ontario justified its decision to ban faith-based arbitration on the grounds that there is no place for religious arbitration in a cohesive multicultural society. McGuinty did not specify how he was using the term or how Ontario's decision was protecting "multiculturalism." The literature review demonstrates that there are differing views about how a polyethnic state should treat minority differences. A review of the theories of pluralism and Canada's multiculturalism policy suggests that the government could have either preserved or banned faith-based arbitration in the name of "multiculturalism." If Ontario is truly concerned about whether religious arbitration is consistent with multiculturalism, it should study whether religious minorities have been treated unfairly within the judicial system. If the demands arise from discrimination in the legal system, rather than from a cultural authority's desire to protect culture for culture's sake, or control its members, both theories of pluralism and the multiculturalism policy might support introducing some kind of alternative measures.

Chapter Three studies the treatment of religious minorities in the legal system through a judicial discourse analysis of family law decisions involving Muslim marriage

contracts. It takes the historical institutional approach by focusing on how the state can help create demands for faith-based arbitration, rather than assuming that the demands naturally arise from specific cultural traits. The way that the court treats religious minorities in family law cases can help determine whether demands for faith-based arbitration may be attributed, in part, to the legal system's failure to adequately address religious concerns.

Chapter Three  
Judicial Discourse and Muslim Family Law Contracts

Scholars have suggested that demands for faith-based arbitration arise, in part, from a perception that the court system cannot adequately respond to the demands of religious minorities. Religious minorities may request a mechanism like faith-based arbitration because it can be presided over by religious authorities who will understand the context and importance of their religious request, unlike the secular court.<sup>149</sup> Demands for faith-based arbitration may stem, at least in part, from the court's treatment of religious minorities.

The legal system's treatment of religious minorities is examined because couples will most likely use marriage contracts to enforce religious obligations now that faith-based arbitration decisions are no longer legally binding. It is worth looking at how the court has dealt with these contracts in the past. Does the court engage in inclusive dialogue, demonstrating sensitivity to the religious request, or has it dealt with requests in ways that could create concerns about resorting to the legal system? This chapter reviews case law dealing with Muslim marriage contracts and the court has treated religious clauses in family law contracts inconsistently. This inconsistency has led to an uncertain state of law. The review also demonstrates that the language and reasoning used by the court can be insensitive to religious differences.

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<sup>149</sup> Lori Beaman, "The Myth of Pluralism, Diversity and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada," *Journal for the Scientific Study of Religion*, 42, no. 3 (2003): 318; Irshad Abdal-Haqq and Qadir Abdal-Haqq, "Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States," *Journal of Islamic Law*, 1 (1996): 72; Pascale Fournier, "The Erasure of Islamic Difference in Canadian and American Family Law Adjudication," *Journal of Law and Policy*, 10, no. 51, 2001-2002.

### “Sensitivity” in Judicial Discourse

The Oxford English Dictionary defines “insensitive” as “not aware of or able to respond to something.”<sup>150</sup> This chapter shows that the court is not ‘insensitive’ in that it display *no* concern for the interests of minorities, but rather that the court can be unaware of or less able to respond to issues facing religious minorities.

Insensitivity is used to describe cognizance of differences. “Insensitive” is not an ideal term because it implies a degree of subjectivity, but similar problems arise with more objective terms like “fairness” or “equality” as well. As the introduction points out, “equality” can be defined in different ways. What different groups regard to be “fair” might differ depending on what they expect from the state. Using “sensitivity” as a concept through which the court’s treatment of religious minorities is examined is consistent with the way the term “sensitivity” is used by Avigail Eisenberg in “Identity and Liberal Politics.”<sup>151</sup>

To help avoid the subjectivity that arises from the concept of “insensitivity,” this paper will use this term to refer to how the court considers the religious context of the minority request. It can help identify why Muslims may be concerned that the judicial system is unable to adequately address Islamic issues.<sup>152</sup>

### The Intersection of Religion and Contract Law

The Canadian Constitution does not have an anti-establishment clause that clearly separates church and state. The freedom of conscience and religion at section 2(a) of the *Charter* means that Canada cannot compel its citizens to observe a particular religion, or

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<sup>150</sup> The Compact Oxford English Dictionary, s.v. “insensitive.” Online edition, accessed April 5, 2006; available from <http://www.askoxford.com>.

<sup>151</sup> Eisenberg, “Identity and Liberal Politics,” 250.

<sup>152</sup> Abdal-Haqq, 72.



to engage in religious practices. Canada has a kind of “cooperationist” relationship with churches, which is described as one where “a separation of church and state is claimed yet a posture of benevolent neutrality toward religion is maintained.”<sup>153</sup> While there is no clear doctrine of separation of church and state in Canada, some separation is implied.<sup>154</sup> This is in line with the liberal democratic principle that there should be some separation between church and state, and of religious and secular reasoning in political decisions.<sup>155</sup>

Religion and family matters generally form part of the private sphere, but the public and private spheres intersect when couples make a contract dealing with issues of civil status like marriage or divorce. The court cannot avoid matters of religion in family law disputes. Religious couples have asked that the court enforce marriage contracts based on religious obligations.

The remainder of this chapter demonstrates that judges have had difficulty determining whether religious beliefs can be recognized in a way that is consistent with the principles of contract interpretation. They have been inconsistent in their approach. In some cases the court has been willing to look beyond the religious intentions of parties to the terms of the contract to see whether it can be upheld at law. In other cases, the court refused to uphold a contract because its terms referred to religious obligations. There has been inconsistency between provinces and inconsistency in the court’s reasoning between cases. Consistency in the law is important because it helps individuals to know whether their contract will be enforced.

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<sup>153</sup> Natasha Bakht, “Arbitration, Religion and Family Law: Private Justice on the Backs of Women.” Report prepared for the National Association of Women and the Law, March 2005 [online]; accessed 24 May 2005; available from <http://www.nawl.ca/ns/en/publications.html>, 53.

<sup>154</sup> *Ibid.*

<sup>155</sup> Audi, 275-6.

Since the court cannot avoid dealing with religious issues or requests, they should deal with these matters consistently. The court must decide whether it can uphold contracts that refer to religious obligations or whether they must be struck down as void for public policy reasons, however, contracts that do not require the court to make pronouncements on the substantive content of religious obligations or practices but were made to be consistent with a religious belief may not be against public policy.

Laws are not “neutral” with respect to religion. Pascale Fournier warns against applying “neutral” legal principles to minorities, because the laws are not neutral but reinforce majoritarian concepts.<sup>156</sup> The laws arise from the Christian tradition and are embedded with Christian ideals, even if they do not explicitly contain specific Christian principles. The lack of Christian marriage contracts dealing with these issues suggests that the laws generally accord with Christian beliefs in matters of custody and property division. “Neutral” family laws have had a disproportionate effect on religious minorities.

Even though Canadian laws have become more secular, they derive from Christianity. Christian beliefs have historically been pervasive in Canadian family law. The common-law definition of marriage was accepted until 2003, when the Ontario Court of Appeal ruled that it was unconstitutional because it did not include same-sex marriages.<sup>157</sup> The accepted definition was Lord Penzance’s religiously-based statement in *Hyde v. Hyde and Woodmansee*<sup>158</sup>. He said, “I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man

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<sup>156</sup> Fournier, 64.

<sup>157</sup> *Halpern v. Canada (Attorney General)* 172 OAC 276 (Ont. C.A.) (*Halpern*).

<sup>158</sup> *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130.

and one woman, to the exclusion of all others.”<sup>159</sup> The statement also precludes the legal recognition of polygamy. The Christian understanding of marriage and its condemnation of extra-marital sex has inspired laws that deny recognition to children born outside of marriage. Limiting divorce to instances where adultery, cruelty or abandonment could be proven reflected the Christian prohibition on divorce.

Most of these laws changed as the majority became increasingly secular. Children born outside of marriage are no longer legally “illegitimate,” and the law has adopted a “no-fault” approach to divorce. The Christian definition of marriage has changed, although polygamous unions are still not recognized and bigamy remains a criminal offence. These changes do not prove, however, that family laws are now “neutral.” The parties to cases dealing with religious marriage contracts are overwhelmingly members of minority religions.

This review did not uncover any cases where Protestants or Catholics attempted to contract out of the statutory family law regime. Cases dealing with Catholic or Protestant religious issues in family law contracts were limited to setting out whether the children would go to a religious school or whether they would be raised in a particular faith. This is perhaps because Catholic and Protestant religious doctrine is not inconsistent with the secular laws, and so members of these religions have no reason to enter into religiously-based marriage contracts dealing with property and religion. The other possibility is that mainstream Christian churches have adapted to secular society and do not espouse rules that are severely at odds with mainstream secular values. Either way, the majority’s religious beliefs about property and custody are not at odds with the secular law to the extent that they would want to vary it through contract. The lack of mainstream Christian

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<sup>159</sup> *Halpern* at para. 1.

religious contracts suggests that family laws in Canada affects religious minorities disproportionately as compared to the religious majority.

Egalitarian liberals might argue that although the laws are not “neutral” as to religion, they are “neutral” in the sense that they are applied even-handedly. But if the laws discourage religious minorities from appealing to the court or effectively exclude them from participating in their capacity as religious individuals, one might question how well the court is accommodating difference. Even-handed application of laws that disproportionately affect religious minorities can result in laws that are applied equally but which have disproportionately severe impacts on some groups.<sup>160</sup>

Egalitarian liberalism and the politics of recognition might support exploring legal alternatives due to the disproportionate affect secular family laws have on religious minorities. The politics of recognition would be concerned with judicial discourse that suggests that the court is either not willing or unable to take Muslim differences into account.

This case law review demonstrates that Muslims may be dissuaded from using Canada’s legal institution to resolve family law disputes. The values of Canadian family law and contract law conflict with some religious practices and beliefs to the extent that Muslims may avoid appealing to the court. Furthermore, the uncertain state of the law with respect to religious family contracts and lack of alternatives like faith-based arbitration means that religious minorities may not be able to resolve family law matters with reference to religious beliefs in a legally enforceable manner. If multiculturalism is

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<sup>160</sup> Chief Justice Beverly McLachlin has stated that the court is committed to accommodating difference. See Beverly McLachlin, The Supreme Court of Canada: Welcome, [online]; accessed 10 June 2006, available from [http://www.scc-csc.gc.ca/Welcome/index\\_e.asp](http://www.scc-csc.gc.ca/Welcome/index_e.asp).

meant to ensure “full participation and full contribution by all Canadians,”<sup>161</sup> the state should consider legal alternatives to encourage religious minorities to participate without having to give up their religious identities. One of these alternatives is Pascale Fournier’s functional approach, which is discussed in this chapter. Another alternative is faith-based arbitration, which is considered in more depth in Chapter Four.

### Judicial Treatment of *Mahr* Agreements

Two legal principles come into conflict when the court is called upon to uphold contracts with religious aspects. On the one hand, promoting individual autonomy is at the root of contract law. On the other, the court adheres to the principle that it generally should refrain from interfering in matters of religion.

Contract law presumes that individuals know what is in their own best interest and allows them the freedom to pursue it. Contract law renders the state neutral as to the individual’s objectives.<sup>162</sup> It emphasizes individual liberty, autonomy, and self-reliance. Individuals are encouraged to pursue their own self-interest by ordering their lives in a way that will cause them the most happiness, or allowing them to contract to do that which they believe is just or right. This is consistent with the liberal view that the state should not interfere with the actions of individuals unless they cause harm to others.<sup>163</sup> Contract law generally allows people to agree to anything that is not otherwise illegal or void on public policy grounds. It protects vulnerable people from contracts that would otherwise be enforceable by vitiating them if its terms are vague or unconscionable, or if there is evidence that fraud, duress, or coercion was exerted on one of the parties.

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<sup>161</sup> Samuel, 32.

<sup>162</sup> Hugh Collins, *The Law of Contract*, 3<sup>rd</sup> ed. (London: Butterworths, 1997), 6.

<sup>163</sup> John Stuart Mill, *On Liberty*, (Reprint, Oxford: Oxford University Press, 1991), 16-17.

When religious contracts are put before it, the court must balance the principle of individual liberty with the principle that the state should not interfere with matters of religion. The court abhors making pronouncements on religious doctrine. Justice Iacobucci iterated this principle in *Syndicat Northcrest v. Amselem*.

In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.<sup>164</sup>

Just as the court refuses to become entangled with religious laws, it also refuses to allow religious laws to interfere with civil laws. In *Baxter v. Baxter*<sup>165</sup>, a Catholic man argued that the court was violating his freedom of conscience and religion by granting his wife a divorce. He argued that they had a religious duty to remain married.<sup>166</sup> Justice Pennell stated,

Marriage, like divorce, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Public policy has fixed the status of the marriage transaction as a civil contract. The parties may choose to enter into a marriage contract in the manner directed by their religious scruples or the canons of their church, but as a civil contract, the legal effect may not be altered by private agreement of the parties or their religious tenets. Out of marriage spring social relations and duties with which government is necessarily required to deal.<sup>167</sup>

But this principle may not extend so far that it precludes the court from enforcing otherwise legal contracts simply because its terms are *based on* religious beliefs. The cases dealing with Islamic marriage contracts, or *mahr* agreements,<sup>168</sup> have forced the court to determine whether they can adjudicate contracts where the terms are based on

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<sup>164</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 50 [*Amselem*].

<sup>165</sup> *Baxter v. Baxter*, 1983 CarswellOnt 324 (Ont S.C.).

<sup>166</sup> *Ibid.*, at paras. 3-4.

<sup>167</sup> *Ibid.*, at para. 12.

<sup>168</sup> The case law and scholarship indicate that there is more than one accepted spelling variation of "mahr", but this spelling is adopted for the purposes of this thesis.

specific religious beliefs. The *mahr* agreement is a marriage contract whereby the husband agrees to pay the wife a specified amount upon the dissolution of their marriage. It is designed to provide the wife with financial security.<sup>169</sup> Sometimes the husband pays a small portion of the *mahr* at the time of marriage and defers the remaining, larger portion to be paid if the marriage dissolves. The *mahr* is described in the case law as one of three elements necessary for an Islamic marriage, which include competence to marry, declaring the intention to marry before witnesses, and agreeing to a *mahr*.<sup>170</sup> Canadian trial-level courts have disagreed as to whether the *mahr* is justiciable.

The Ontario Court of Justice refused to uphold a *mahr* agreement in the 1998 case, *Kaddoura v. Hammoud*. The husband and wife signed a *mahr* agreement prior to the wedding. The husband paid five thousand dollars at the time of the ceremony and deferred thirty thousand dollars to be paid if the marriage dissolved.<sup>171</sup> Less than two years later, he served his wife with a petition for divorce.<sup>172</sup> At trial she argued that the *mahr* was enforceable under section 52(1) of the Ontario *Family Law Act*, which allows for any two married people to enter into a contract regarding ownership in or division of property.<sup>173</sup> The husband argued that the *mahr* was a religious contract and therefore not justiciable at law.<sup>174</sup> There was no conflict between the parties about what the *mahr* required them to do. The husband's argument was quite straightforward. While he

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<sup>169</sup> *Kaddoura v. Hammoud* (1998), 168 D.L.R. (4th) 503 (Ont. Ct. J.) at para. 13 [*Kaddoura*].

<sup>170</sup> *Ibid.*, at para. 12.

<sup>171</sup> *Ibid.*, at para. 15.

<sup>172</sup> *Ibid.*, para. 4.

<sup>173</sup> Section 52(1) of the *Family Law Act* states:

“Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including, (a) ownership in or division of property; (b) support obligations; (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and (d) any other matter in the settlement of their affairs.”

R.S.O. 1990, c. F.3, s. 52 (1); 2005, c. 5, s. 27 (25) [*FLA*].

<sup>174</sup> *Kaddoura* at para. 23.

understood the terms of the *mahr*, he did not think that the civil court would ever compel him to pay the deferred portion.<sup>175</sup>

The court accepted the husband's argument. Justice Rutherford found that the *mahr* was "fundamentally an Islamic matter," and as such, any consequences of breaking the agreement must be solely religious as well.<sup>176</sup> He believed that enforcing this agreement would force the court to overstep its role and rule on religious dogma. He stated,

In my view, to determine what the rights and obligations of Sam and Manira are in relation to the undertaking of Mahr in their Islamic marriage ceremony would necessarily lead the Court into the "religious thicket," a place that the courts cannot safely and should not go.<sup>177</sup>

This result contradicts a line of British Columbia cases upholding the *mahr*. The first British Columbia case to consider the *mahr* was *Nathoo v. Nathoo*.<sup>178</sup> The parties to this case underwent an Islamic marriage ceremony which included entering into a *mahr* agreement. The document they signed stated,

I hereby agree and undertake to pay an agreed sum of money by way of "Maher" to my said wife. I hereby agree and confirm and declare that my understanding to pay the agreed sum of money by way of Maher to my wife shall be in addition, and without prejudice to and not in substitution of all my obligations provided for by the laws of the land.<sup>179</sup>

The court found that this constituted a marriage agreement pursuant to section 48 of the 1979 *Family Relations Act*.<sup>180</sup> Having accepted that the contract was justiciable, the judge proceeded to consider the husband's argument that it should be varied because its terms were unfair. The court rejected this argument and enforced the *mahr*.<sup>181</sup>

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<sup>175</sup> *Ibid.*, at para. 16.

<sup>176</sup> *Ibid.*, at para. 25.

<sup>177</sup> *Ibid.*, at para. 28.

<sup>178</sup> *Nathoo v. Nathoo*, 1996 CarswellBC 2769 (B.C.S.C.) [*Nathoo*].

<sup>179</sup> *Ibid.*, at para. 8. This wording is the same in all the *mahr* agreements considered in *Nathoo*, *Amlani* and *M. (N.M.)*.

<sup>180</sup> *Ibid.*, at para. 23.

<sup>181</sup> *Ibid.*, at paras. 26-27.



*Amlani v. Hirani*<sup>182</sup> was decided four years later. The husband applied to the court for a declaration that the *mahr* was not a marriage agreement pursuant to section 61(2) of the 1996 *Family Relations Act*.<sup>183</sup> The court upheld the *mahr* by finding it constituted a marriage agreement for ownership in “other” property.<sup>184</sup> This court found that each element that the *Family Relations Act* requires in a valid marriage contract was present in this case.

The facts in *M. (N.M.) v. M. (N.S.)*<sup>185</sup> were similar. The husband signed a *mahr* agreement where he agreed to pay \$51,250 if he and his wife separated.<sup>186</sup> Like in *Kaddoura*, the husband argued that he believed that the *mahr* was only a ceremonial agreement that would not be upheld in a secular court. While he did not read the document, he admitted that he understood its terms.<sup>187</sup> The court differed from *Kaddoura* by upholding the *mahr*,<sup>188</sup> even though the facts of both cases were essentially identical and the family law legislation was very similar.

The Ontario Court of Justice decided the latest case considering an Islamic marriage in 2005. *Khan v. Khan*<sup>189</sup> dealt with a *nikah* agreement. The case describes a *nikah* as a standard Pakistani marriage contract.<sup>190</sup> The parties were married in a religious ceremony

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<sup>182</sup> *Amlani v. Hirani*, 2000 CarswellBC 2663, 2000 BCSC 1653 [*Amlani*].

<sup>183</sup> *Ibid.* at para. 10. Section 61(2) of the 1996 *Family Relations Act* states:

A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for (a) management of family assets or other property during marriage, or (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

R.S.B.C. 1996, c. 126.

<sup>184</sup> *Amlani* at paras. 16-17 and 32.

<sup>185</sup> *M. (N.M.) v. M. (N.S.)*, 2004 CarswellBC 688, 2004 BCSC 346 [*M. (N.M.)*].

<sup>186</sup> *Ibid.*, at para. 7.

<sup>187</sup> *Ibid.*, at para. 26.

<sup>188</sup> *Ibid.*, at paras. 29-30 and 32.

<sup>189</sup> *Khan v. Khan*, 2005 CarswellOnt 1913, 2005 ONCJ 115 (Ont. Ct. J.) [*Khan*].

<sup>190</sup> *Ibid.*, at para. 22.

in Pakistan.<sup>191</sup> This was an arranged marriage, “according to their culture’s tradition.”<sup>192</sup> The husband was in Canada at the time of the marriage and signed the marriage contract by proxy.<sup>193</sup> He then sponsored his wife’s immigration to Canada, but they separated approximately one year later.<sup>194</sup> The *nikah* contained a provision whereby the wife renounced her right to spousal support.<sup>195</sup> The husband argued that the *nikah* was a valid marriage agreement that must be recognized internationally.<sup>196</sup> The wife relied on *Kaddoura* for the proposition that the contract was religious in nature and therefore not justiciable by the civil court.<sup>197</sup>

The court decided to “enter into the religious thicket” and consider whether the contract was justiciable.<sup>198</sup> The agreement was deemed to be a valid marriage contract, but was set aside pursuant to section 56(4) of the *FLA*<sup>199</sup> on the grounds that enforcing it would result in unconscionable circumstances. The court found as a matter of fact that the wife had no part in negotiating its terms and had no choice but to sign it in order to be married. She did not have total financial disclosure from her husband and there was inequality of bargaining power as she had not received independent legal advice.<sup>200</sup> These

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<sup>191</sup> *Ibid.*, at para. 2.

<sup>192</sup> *Ibid.*, at para. 9.

<sup>193</sup> *Ibid.*, at paras. 10-11.

<sup>194</sup> *Ibid.*, at paras. 13 and 17.

<sup>195</sup> *Ibid.*, at para. 22.

<sup>196</sup> *Ibid.*, at para. 29.

<sup>197</sup> *Ibid.*, at para. 25.

<sup>198</sup> *Ibid.*, at para. 32.

<sup>199</sup> Section 56(4) of the *FLA* states, (4) Setting aside domestic contract. -- A court may, on application, set aside a domestic contract or a provision in it, (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made; (b) if a party did not understand the nature or consequences of the domestic contract; or (c) otherwise in accordance with the law of contract. *Family Law Act*, R.S.O. 1990, c. F.3.

<sup>200</sup> *Khan* at paras. 49-50.

factors led the court to declare that the wife did not understand the nature or consequences of the contract.<sup>201</sup>

The British Columbia and Ontario trial courts have been inconsistent with each other in their treatment of the *mahr*. The British Columbia trial court has upheld the *mahr*, while the Ontario court has struck it down. Although the decision in *Kaddoura* does not set out the precise wording of the contract, it appears that the *mahr* in this case contained similar terms to the agreement described in *Nathoo*. The Ontario and British Columbia family law statutes are also similar, so it is reasonable to expect that *Kaddoura* and the British Columbia cases would have had the same outcomes.

The Ontario court was inconsistent between *Kahn* and *Kaddoura* as well. In *Kaddoura*, the court refused to even consider the contract because it referred to a religious obligation. In *Khan* the court noted that the contract was religious in nature but decided to consider it anyways. This contract was deemed to be justiciable at civil law. While the court likely came to the correct outcome in *Khan*, it is interesting that in this case the court would consider a religious contract but in *Kaddoura* it would not. The divergent approaches taken in *Kaddoura*, *Khan* and the British Columbia cases indicates that guidance is needed from an appeal level court to clarify how religious marriage agreements should be handled.<sup>202</sup> The court should be clear about when it will “enter the religious thicket.” Greater consistency would help minorities determine whether a contract is worth pursuing in the secular court and would also help clarify when the court can decide issues relating to religion.

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<sup>201</sup> *Ibid.*, at para. 53.

<sup>202</sup> Bakht, “Family Arbitration Using Sharia Law,” 12.

It is clear that the court abhors making pronouncements about the content of a religious obligation. If the content of the religious obligation is not at issue, are contractual terms reflecting a religious belief enough to render that contract unenforceable? If so, religious minorities are forced to translate religious obligations into secular terms in order to form binding contracts. In *Kaddoura*, Justice Rutherford suggested that the contract may have been enforceable if it were not for its religious intention. Justice Rutherford refused to award the husband costs.

[It was] somewhat offensive and dishonourable on the part of Mr. Kaddoura, to knowingly participate in the wedding customs and practices of his Muslim community, including the *mahr* which he clearly knew included a "written" or deferred amount of \$30,000, and then eschew those customs and practices when they worked to his financial detriment.<sup>203</sup>

Justice Rutherford's statement implies that the contract was binding on some level, and perhaps would have upheld the agreement but for its religious nature.

If so, it was not the content of the contract but the religious intention that the court refused to recognize. This could impact the religious minority's identity by communicating that their religious identity is incompatible with Canadian legal institution. It is the specific practice or belief but the language of religion that is inconsistent with Canadian law. Furthermore, family law's consistency with mainstream Christianity increases the likelihood that this requirement will unduly impact on religious minorities.

#### The Implications of Judicial Discourse in *Mahr* Disputes

The inconsistency of judicial treatment and outcome causes uncertainty in the law for religious minorities. Fournier argued that when the court refuses to enforce a contract

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<sup>203</sup> *Kaddoura v. Hammoud*, 1999 CarswellOnt 191 (Ont. Ct. J.), at para. 6.

because it was made for a religious purpose, even though its terms would otherwise be enforceable, it sends the message to minorities that “some people are allowed to participate in the construction of Canadian identity; some are not.”<sup>204</sup> This case law review suggests that the Canadian court is not adequately achieving the goal of being sensitive to religious difference.

The court was insensitive to religious minorities in *Kaddoura*, *Nathoo*, *Amlani* and *M. (N.M.)* insofar as it dealt with the religious nature of the contracts in an all-or-nothing way. When the court refused to enforce the agreement in *Kaddoura*, it did so by placing so much emphasis on the religious aspect of the terms that the contract became unrecognizable at law. Justice Rutherford made religion the determinative issue by construing religion as outside the realm of the law. The judge felt he had no authority to write about Islam because he was not Muslim.<sup>205</sup> But having decided that he was not qualified to determine the nature of the Islamic agreement, he goes on to compare the *mahr* agreement to traditional Christian vows.

While not, perhaps, an ideal comparison, I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in the civil courts as is an obligation in a Christian religious marriage, such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live, or to raise children according to specified religious doctrine. Many such promises go well beyond the basic legal commitment to marriage required by our civil law, and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.<sup>206</sup>

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<sup>204</sup> Fournier, 62.

<sup>205</sup> Fournier, 63.

<sup>206</sup> *Kaddoura* at para. 25.

Natasha Bakht and Fournier argue that the comparison is inappropriate. The Christian vows to “love, honour and cherish” are vague and unenforceable, whereas the *mahr* is an obligation to pay a previously agreed-upon sum of money.<sup>207</sup>

The court diminishes the dignity of individuals by limiting their ability to form contracts when it refuses to uphold agreements that would otherwise be enforceable simply because the agreement incorporates religious beliefs. This allowed the court to ignore the perspective of the parties or the implications of not upholding the agreement. It allowed the court to avoid a contextual approach. In her case law analysis, Fournier argued that the judgment in *Kaddoura* rendered the “particular experience and perspective of Muslim people invisible at the same time as it marks them as the ‘Other.’”<sup>208</sup> Based on general principles of contract law, *Kaddoura* may have been decided differently had the parties entered into the same contract without mentioning religion.<sup>209</sup>

The court dealt with religion in an all-or-nothing way in the British Columbia cases where the *mahr* was upheld by either unduly ignoring the contracts’ religious aspects or by deferring to Islamic law as determinative. The court ignored religion in *Amlani*. The only mention of religion was the recognition that the *mahr* was made as part of the marriage ceremony in accordance with the Ismaili Muslim tradition.<sup>210</sup> Otherwise, the court construed the document as secular in nature. It recognized that the *mahr* is a financial obligation and enforced the contract, but it did so by rendering the document’s religious aspects invisible. By ignoring religion, the court avoided making any

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<sup>207</sup> Fournier, 61; Bakht, “Family Arbitration using Sharia Law,” 13-14.

<sup>208</sup> Fournier, 53.

<sup>209</sup> *Ibid.*, 63.

<sup>210</sup> *Amlani* at para. 10.

pronouncement about whether the contract could be religious and also enforceable. This could be resolved if the court would clarify whether it must treat the contractual duty as something to be enforced apart from religious obligation or whether the religious obligations underlying the contractual duty can be consistent with the law. While the court should refrain from making statements about religion if it is irrelevant, the *mahr* is part of a religious belief system and the ruling would be more accurate if this fact were addressed.

Ignoring the religious identity that the parties adopt in the contract can also have implications for the way their identity is constructed in court. "...to ignore the identity-related nature of these disputes [identity claims] or to recast identity-related claims so that they are no longer presented in terms of identity offers, at best, an indirect and often inadequate means of resolving such disputes."<sup>211</sup> Clearly the parties have ordered an important family relationship according to the dictates of their faith, and at least for some individuals, those religious beliefs form part of their identity.

In *Kaddoura*, the court accepted that the husband understood the terms of the agreement, was required to enter into it to be married religiously, but refused to enforce it.<sup>212</sup> Similarly, in *Nathoo* and *M. (N.M.)*, the court found that in order to marry in the Ismaili-Muslim tradition they had no choice but to enter into the *mahr*.<sup>213</sup> Justice Joyce wrote, "Both parties wished to marry in the Ismaili faith and they understood and accepted that a condition of doing so was to agree to the Maher."<sup>214</sup> In British Columbia,

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<sup>211</sup> Eisenberg, "Identity and Liberal Politics," 249.

<sup>212</sup> *Kaddoura* at paras. 25-28.

<sup>213</sup> *Nathoo* at para. 24; *M. (N.M.)* at para. 7.

<sup>214</sup> *Ibid.*, at para. 28.

the fact that they had “no choice” but to enter into the contract in order to be married religiously is not enough to overturn it.

The different outcomes might reflect different perspectives on the importance of the right of exit. As noted in Chapter Two, Jeff Spinner-Halev argues that if certain minimum standards are present,<sup>215</sup> individuals have the right to exit their culture or religion if they disagree with its rules, and so the state should permit individuals to make choices that appear to be illiberal.<sup>216</sup> This was the approach taken in *Nathoo* and *M. (N.M.)*. Justice Rutherford appeared to take the opposite approach in *Kaddoura*; the fact that the individuals either had to sign the *mahr* or marry outside their religion was not seen to be a real choice.

The approach in *Khan* was sensitive because the court took a contextual approach to the case. Only after the technical elements of the document were examined to see if the contractual requirements had been fulfilled did the court consider the document’s religious aspects. While this approach was respectful because it recognized both the religious and the secular aspects of the agreement, the judge made statements that could have negative implications for the Muslim identity. He took the approach taken by Justice Rutherford in *Kaddoura*, finding that there was an inequality of bargaining power because the wife essentially had no choice but to enter into the *nikah* agreement in order to complete the religious marriage.<sup>217</sup>

The different approaches taken on this issue in these cases are interesting. In *Nathoo* and *M. (N.M.)*, the court found that the parties truly consented to the agreement

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<sup>215</sup> The minimum standards he refers to include decent health care, nutrition, social interaction, basic literacy and a mainstream liberal society. The minimum standards ensure that a person has a real right to exit. Spinner-Halev, 160.

<sup>216</sup> Spinner-Halev, 159-60.

<sup>217</sup> *Khan* at para. 49.



when they were married. They knew that the agreement was necessary to be married religiously and, by choosing to marry religiously, they had to agree to the *mahr*. In *Kaddoura and Khan*, the court found that because the *mahr* or *nikah* is an essential part of the Muslim marriage, the parties did not have a real choice but to enter into it. The Ontario and British Columbia courts came to opposite conclusions on the same issue. In *Nathoo and M. (N.M.)*, the court focused on the fact that the *mahr* was essential to the religious ceremony. They accepted that the parties wanted to be religiously married, and that therefore they must also have accepted that they were required to enter into a civilly enforceable *mahr* agreement. The husbands testified that they did not believe that their agreements would be civilly enforced. Whether they truly believed this or whether they were arguing it in court in an attempt to circumvent their contractual responsibilities is a finding of fact for the court to decide. A judge could presumably still consider whether the parties understood they were making a binding contract within the secular rules governing contract interpretation.

The court was unwilling to uphold the *nikah* because it would have had unconscionable results. Removing the wife's right to property would have been a particularly harsh result since she had recently immigrated and was being sponsored by her husband. Upholding the agreement would have left her alone in a new country with no financial resources whatsoever.

The use of the term "unconscionable," however, has negative implications for the Muslim identity. Justice Clark quotes *Black's Law Dictionary's* definition of "unconscionable contract" as "one which no man in his senses, not under delusion, would

make on the one hand, and which no fair and honest man would expect on the other.”<sup>218</sup> The court noted that the wife had entered into marriage according to the dictates of her culture.<sup>219</sup> The *nikah* was called a “standard marriage contract in Pakistan.”<sup>220</sup> Linking the *nikah* to the cultural norms and then calling it “unconscionable” suggests that if a Muslim woman has entered into a *nikah* agreement, she must have either been forced to do so or she is not “in her senses.” This paternalistic view discounts the beliefs of Muslim women. While the issue of the wife’s consent, and whether it is “true” consent or whether she is being pressured by her family or community is a difficult issue, and one that is discussed in more detail in Chapter Four. One must accept the possibility that some women would choose to enter into this kind of contract. The term “unconscionable” diminishes her capacity to consent.

*Khan* would have been better decided by focusing on the specific circumstances of the parties. The judge makes no reference to whether the wife willingly submitted to the arranged marriage and *nikah* agreement. She might have validly submitted to the agreement and later opposed it on the grounds that it would result in unconscionable circumstances in light of the couples’ immigration.

The judge could have gotten around stripping the wife of her entitlement to support by refusing to uphold the contract because of her present circumstances. The situations of the parties had changed since the time of marriage. Justice Clark noted that the court will afford less weight to a marriage contract than to a separation agreement because the marriage contract is entered into at the time of marriage and might not reflect the situation, needs, or financial resources of the parties at the time the marriage breaks

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<sup>218</sup> *Ibid.*, at para. 41.

<sup>219</sup> *Ibid.*, at para. 9.

<sup>220</sup> *Ibid.*, at para. 22.

down. Separation agreements, on the other hand, are generally negotiated with a view to divorce and with knowledge of the financial resources and the particular situation of both parties.<sup>221</sup>

A contextual approach to family law contracts that takes cultural or religious laws, traditions and obligations into account would show respect for these practices and help the court to better understand the position of the parties before it. Responding to religious beliefs with respect and understanding requires being sensitive to context. In order to be sensitive to context, judges must be educated about religious differences and their importance.

Pascale Fournier advocates increasing the court's sensitivity to cultural and religious minority demands through the "functional approach." When a *mahr* agreement is before the court, she suggests that the court first analyze the document to see if it contains the technical elements necessary for it to be a legal contract. If it does, the judge should proceed to address the role that the *mahr* plays in the Muslim marriage to determine its enforceability as a matter of public policy.<sup>222</sup> This requires taking notice of the specific facts of the case, as well as the social, cultural and religious contexts within which those facts exist.<sup>223</sup> She describes the functional approach as a way of focusing on the situation from the parties' own perspective, rather than focusing on their cultural differences and how they are unfamiliar to the law.<sup>224</sup> The functional approach recognizes

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<sup>221</sup> *Ibid.*, at para. 61.

<sup>222</sup> Fournier, 71.

<sup>223</sup> *Ibid.*, 70.

<sup>224</sup> *Ibid.*, 71.

differences as relational rather than intrinsic.<sup>225</sup> A minority's difference is determined in relation to the majority, rather than understood as being inherently good or bad.

Fournier argues that this approach would improve the situation of women who are party to *mahr* agreements. It asks for the woman's perception of her religious marital obligations rather than silencing her by ignoring her religious request and forcing her to look exclusively to religious authorities for recognition, or by accepting the contract as a given and deferring to the Islamic authority's interpretation of what Muslim law requires.<sup>226</sup> At the moment, Muslim women are prone to being silenced in family law disputes.

Muslim women become monumentalized objects, frozen and fixed eternally through the colonial gaze of judges without any account for *their own* perspective of what it means to be Muslim, "oriental" and different. These female litigants' personhood disappears during the majoritarian legal decision-making process. In denying their claims, judges display an impoverished understanding of what culture and religion are, how they differ and why they matter... Both Canadian and American judicial discourse...is at once horrified and fascinated by Muslim women.<sup>227</sup>

This comment refers to the situation in *Kaddoura* where the court denied the woman's claim. This statement could also apply to the *Khan* decision, even though the woman's claim was accepted in this case. The decision in *Khan* was written from the court's own perspective, with little reference to the wife's beliefs. The *nikah* agreement would result in a wife losing her right to spousal support, a result that is inconsistent with Canadian family law legislation and potentially at odds with the Charter values that protect gender equality. It is important not to discount the *nikah* solely because of a perception that it is not in line with "Canadian" values. The court should hear from the

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<sup>225</sup> *Ibid.*, 52.

<sup>226</sup> *Ibid.*, 62.

<sup>227</sup> *Ibid.*, 56-57 and 94.

woman who has given up her right to spousal support to understand the role that agreement played in the marriage and why she opposes the agreement.

Fournier's approach allows the judge to consider the needs and circumstances of the parties and strike down contracts that result in unconscionable circumstances. Nothing prevents women from contracting out of their property rights where religion is not an issue. By calling the cultural practice "oppressive" it denies the possibility that Muslim women may want to live in the manner dictated by their culture or religion. Fournier's approach protects the dignity of *individuals* rather than forcing people into comprehensive categories such as "woman" or "Muslim".

Fournier's approach is similar to Shachar's "joint-governance" model in that they both highlight the need for cooperation between the state and religious or cultural authorities in the area of family law. Shachar argued that cultural groups and the state should share jurisdiction over family law issues.<sup>228</sup> Fournier envisioned leaving authority solely with the court. Despite the differences in their proposed solutions, both scholars recognized the ineffectiveness of subjecting religious minorities to the authority of a state institution which does not recognize the importance of the religious issues to the parties before it.

Fournier's functional approach would make the court's approach to religious issues more consistent. Laws that seem innocuous to the Canadian majority can have severe consequences for those who come from non-Christian religions. "The coercive power of the law resides precisely in its ability to appear neutral when in reality it shapes society in the mold of dominant values."<sup>229</sup>

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<sup>228</sup> Shachar, "Religion, State and the Problem of Gender."

<sup>229</sup> Fournier, 94.

Adopting Fournier's approach would give religious minorities, and the minorities within those minorities, a voice in the courtroom. If the court refuses to uphold contracts that refer to religion without offering other religiously-based options like faith-based arbitration, religious minorities are less able to participate in the legal system while simultaneously retaining their religious identities. Their beliefs are portrayed as foreign to Canadian values so that the judicial system is not able to recognize or uphold them. The court in *Khan* noted that allowing different religions or cultures to carry out their beliefs may result in circumstances that are "unacceptable" to Canadian society, effectively marking the "foreign" culture as "un-Canadian."<sup>230</sup> In refusing to make pronouncements about the validity of contracts based on religious belief, the court sends a strong message that the religious beliefs themselves are invalid or inconsistent with mainstream Canadian values. The court interprets family law contracts in accordance with majoritarian concepts, forcing the religious minority to conform in order to gain legal recognition.

A pluralist society's legal system should consider ways to evaluate contracts that arise from religious beliefs. The court should not begin ruling on religious dogma, but it might be able to enforce religious clauses in contracts that otherwise comply with legal requirements if the contract does not require that the court determine substantive religious questions. The court can validly refrain from becoming "arbiters of religious dogma" and still rule on *mahr* agreements. None of the five cases examined in this chapter required the court to determine the substantive requirements of Islam.

If Canada aspires to multiculturalism that allows individuals to keep their ethnic identity while feeling a sense of belonging to the state, the legal system should be concerned with improving equality of treatment for Muslims in family law. It should be

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<sup>230</sup> Fournier, 53.

concerned with the way Muslim identity is being construed in the courtroom. The court cannot avoid dealing with religion in family law cases, so it should adopt a consistent, sensitive, contextual approach to family law disputes where religion plays a central role. This requires giving effect to a contract that fulfills the requirements of secular contract law despite religious intentions, but not by merely ignoring the contract's religious aspects.

The politics of recognition might argue that the court is not sufficiently engaging in a democratic dialogue with the religious minorities in these cases by ignoring a contract's religious aspects or by demonstrating an insufficient understanding of religious beliefs through inappropriate comparisons to the majority. Ignoring religious beliefs when minorities have clearly relied on them to shape their legal obligations means ignoring a fundamental way in which religious people understand themselves and their place in society. It suggests that the state will ignore religion, and therefore the person who understands his or her identity as 'religious' cannot fully participate in Canadian society. In *Khan*, the court is more sensitive to context, but referring to the contract as "unconscionable" is problematic.

Egalitarian liberals might agree that religious minorities are disproportionately affected by statutory family law. They might support finding alternatives within the legal system for religious minorities, despite their belief that pluralist societies should treat everyone the same regardless of their cultural or religious background, because there is a history of discriminatory treatment and a structural problem that leads to this discrimination. Family laws are not "neutral" as to religion, but are generally consistent with Christian principles. The law's inconsistency and insensitivity to religious minority

differences may be enough to show that the court has been unable to deal effectively with religious differences in family law disputes.

Religious contracts in family law arrangements were examined in this chapter because contract law is the most likely way that religious minorities will attempt to have their beliefs recognized at law. But this option may not be viable, and if the court refuses to uphold religiously-based marriage contracts, religious minorities may have little legal recourse. The cases indicate that those seeking to enforce religious obligations through contracts face an uncertain state of law and may face judges who are not sensitive to their cultural or religious differences.

Fournier's functional approach was considered in this chapter as a more sensitive way that the court could deal with religious contracts. The court must become more sensitive and consistent in their consideration of the *mahr* or similar religiously-based agreements. The functional approach may strike a desirable compromise because it requires that minorities appeal to the court, who would be equipped to take the religious differences of the parties into account. Faith-based arbitration is another option that may help the court deal with minority legal issues.

Neither of these approaches will be able to completely remove insensitivity from the law. But, as the result in *Kaddoura* demonstrates, insensitivity currently exists in the legal system and it can result in unfair treatment. Because problems exist in the current legal system, Ontario might attempt to minimize them by adopting other methods, like faith-based arbitration. Chapter Four evaluates whether the government should consider restoring faith-based arbitration to address the problems that religion can create in family law disputes.



Chapter Four  
The Potential for Faith-Based Arbitration in Canada's Legal System

Chapter Three explained how the legal system treats minorities insensitively. Religious minorities may be reluctant to appeal to the legal system due to fears that the courts will not adequately address religious issues and concerns. In this way, the legal institution itself may be contributing to demands for faith-based arbitration. If so, this could impact negatively on multiculturalism in Canada, which attempts to encourage minorities to retain their identities while participating in state institutions. This chapter examines whether faith-based arbitration could help rectify this situation in a manner that is consistent with a cohesive multicultural society.

The Province of Ontario commissioned former Attorney General Marion Boyd to recommend on the viability of family law arbitration generally and religious arbitration in particular. Groups representing women's rights, human rights and religious faiths<sup>231</sup> submitted concerns about the effects of faith-based arbitration.

These concerns centered around two themes. The first theme was that faith-based arbitration would harm women by subjecting them to patriarchal religious beliefs that women are inferior to men.<sup>232</sup> They feared that faith-based arbitration would lend government support to discriminatory, patriarchal rules by using the courts to enforce the decisions they govern. The second theme was that faith-based arbitration would

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<sup>231</sup> For a complete list of the groups and individuals who made submissions to Marion Boyd, see Marion Boyd, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion. Report prepared for the Attorney General and Minister Responsible for Women's Issues, December 2004, 154-6.

<sup>232</sup> Boyd, 31; Pamela Cross, An Analysis of Marion Boyd's 'Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion.' Report prepared for the Metropolitan Action Committee on Violence Against Women and Children, January 27, 2005. [online]; accessed 24 May 2005; available from <http://www.owjn.org/issues/mediation/boyd.htm>, 11.

encourage minorities to withdraw from mainstream society, isolating themselves in their separate religious communities.<sup>233</sup>

Boyd addressed such concerns in her report. She recommended that the province keep faith-based arbitration, but add safeguards to make the process more fair. These safeguards included mandatory independent legal advice (or that the right to such advice be explicitly waived) and mandatory screening for domestic abuse.<sup>234</sup> She increased the demands placed on arbitrators by recommending that they give written decisions,<sup>235</sup> that they belong to a professional voluntary association and register with the province in order to have their decisions enforced in court,<sup>236</sup> and that they distribute a statement of principles that explains the parties' rights and obligations and the processes under the particular form of religious law to their clients.<sup>237</sup> She recommended that the province play a greater role by instituting public legal education aimed at informing women of their rights at Canadian law<sup>238</sup> and funding information materials about parties' rights and obligations under religious law for community centers that offer arbitration services.<sup>239</sup> She further recommended that the government consider establishing court oversight for settlements based on religious law.<sup>240</sup>

This chapter argues that faith-based arbitration could work successfully in Canada if Boyd's recommendations were adopted. It would avoid isolating minorities by

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<sup>233</sup> This was the Muslim Canadian Congress' submission. Boyd, 52. This position was also put forth by the Canadian Council of Muslim Women. Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women. Report prepared for the National Association of Women and the Law, March 2005. [online]; accessed 24 May 2005; available from [http://www.nawl.ca/ns/en/documents/Pub\\_Rprt\\_ReligArb05\\_en.pdf](http://www.nawl.ca/ns/en/documents/Pub_Rprt_ReligArb05_en.pdf), 56.

<sup>234</sup> Boyd, 136.

<sup>235</sup> *Ibid.*, 134.

<sup>236</sup> *Ibid.*, 135-6.

<sup>237</sup> *Ibid.* 136.

<sup>238</sup> *Ibid.*, 138.

<sup>239</sup> *Ibid.*, 141.

<sup>240</sup> *Ibid.*, 142.

incorporating faith-based arbitration into the legal system. Ontario's decision has not eradicated religious arbitration. It will continue, but outside the law where vulnerable parties do not have the protection of safeguards. Recognizing faith-based arbitration decisions would allow religious minorities to appeal to religious authorities and the state simultaneously, and allow the state to enact safeguards to protect vulnerable parties.

### How Faith-Based Arbitration Can Protect Women

Women's groups were especially concerned about the impacts of allowing families to resolve disputes based on patriarchal religious beliefs. The Canadian Council of Muslim Women argued that, while there are various interpretations of Shari'a law within Islam, some interpretations favour men over women.

For instance, the Islamic Institute of Civil Justice's position on child custody is that the mother is entitled to custody of her son until he is seven years old, and of her daughter until puberty.<sup>241</sup> The International Centre for Human Rights and Democratic Development (ICHRDD) argued that some interpretations of Islam allow men to leave their wives with little financial support or property upon divorce.<sup>242</sup>

Bakht noted that some Muslim countries have refused to sign the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in the name of Islam.<sup>243</sup> There are different interpretations of Islam and Shari'a law, and not all schools of Islamic thought would support patriarchal beliefs. As there is no uniform

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<sup>241</sup> Syed Mumtaz Ali, "Custody and Guardianship in Islam," The Canadian Society of Muslims. [online]; accessed 09 August 2006; available from <http://muslim-canada.org/guardian.htm>.

<sup>242</sup> Rights & Democracy, "Behind Closed Doors: How Faith-based Arbitration Shuts Out Women's Rights in Canada and Abroad," 2005 [online]; accessed 24 May 2005; available from <http://www.dd-rd.ca/rd.ca/english/commdoc/publications/women/arbifaith.htm>, 5.

<sup>243</sup> Bakht, Arbitration, Religion and Family Law: Private Justice on the Backs of Women, 25.

interpretation of Shari'a law, it is conceivable that some arbitrators would use a "regressive interpretation" that would adversely affect women.<sup>244</sup>

The harmful impacts of a regressive interpretation could be limited by adopting Boyd's recommendations. She suggested that a viable faith-based arbitration regime would require that all parties receive independent legal advice before submitting to the procedure. This advice would inform them of their Canadian rights and explain how the outcome might differ under secular law than under religious law. The arbitration would take place by a trained arbitrator who was registered with the province. The arbitrator would screen the parties in an attempt to determine whether they are in an abusive relationship. The *Act* would be changed to prohibit contracting out of the right of appeal. These safeguards would help limit the harm that a regressive interpretation of Shari'a law, or other religious laws, would have on women.

Independent legal advice is critical to ensuring that the parties are making an informed decision to arbitrate. The parties must be informed of their rights at Canadian law and have the arbitration process explained to them. New immigrants to Canada are especially vulnerable to being unaware of their rights at Canadian law. Independent legal advice is important to help ensure that both parties are aware of their secular entitlements and their options for appeal and judicial review. It is difficult to justify the court upholding a decision that awards a woman less than what she would be entitled to at Canadian law unless her decision was informed. Boyd recommended that the Regulations to the Arbitration Act and Family Law Act require the arbitrator to request that the parties

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<sup>244</sup> *Ibid.*, 27.

present him or her with a certificate showing that they had received independent legal advice, or that they had formally waived this right.<sup>245</sup>

Boyd's recommendation that the government develop a screening process for abuse is an important safeguard for women. Alternative dispute resolution is not recommended for couples in an abusive relationship. The power imbalance renders the abused party virtually incapable of protecting her own rights. An abused person is not in an equal bargaining position to the abuser, and is much more likely to give into the abuser's demands.<sup>246</sup> Although it would be difficult, in some situations, to ascertain whether the parties' relationship is abusive, inquiries could be made before arbitration began. Boyd recommended that the government develop a standardized screening process for domestic abuse for family law arbitration. She was not specific about what that screening process would entail.<sup>247</sup>

Boyd's recommendations envisioned increasing the accountability of arbitrators. Boyd recommended changes to the 1991 *Act*, which placed no limitations on who could be appointed to act as the arbitrator. She suggested that all arbitrators register with the province and belong to voluntary professional associations in order for their decisions to be enforced in court.<sup>248</sup> The voluntary professional association would be responsible for training the arbitrators, but she did not specify the amount or type of training that they would receive.<sup>249</sup>

She also increased the responsibilities of arbitrators by recommending that they keep all arbitration records for a minimum of ten years, and requiring that they report to

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<sup>245</sup> Boyd, 136.

<sup>246</sup> Boyd, 97; Bakht, *Arbitration, Religion, and Family Law*, 7.

<sup>247</sup> Boyd, 139.

<sup>248</sup> *Ibid.*, 135-6.

<sup>249</sup> *Ibid.*, 139.

the Ministry of the Attorney General annually. The annual reports were designed to strike a balance between privacy and transparency by requiring that arbitrators report on the number of arbitrations conducted, the number of appeals pending, and any complaints or disciplinary actions taken against them by the courts or their professional body. She further recommended that the public be given access to summaries of their decisions, with identifying information about the parties removed.<sup>250</sup>

Her recommendations would help safeguard women by ensuring that the arbitrator is qualified and accountable, thus increasing the likelihood that the procedure would adhere to state regulations.

The government should also make arbitrators available who could arbitrate according to different religious interpretations. This would ensure parties can choose an arbitrator who will apply the interpretation of the religious law in which they believe. Not only should arbitrators be available to apply the law of different sects, they should be able to apply both the moderate and fundamentalist interpretations within those sects.

While theoretically the parties decide which religious laws govern the arbitration, the ICHRDD argued that faith-based arbitration would force the state to privilege some religious interpretations over others.

Surely the government has no authority to determine which views are truly authentic to a given faith, but that is exactly what it would be doing by enforcing religious rulings. It would effectively privilege certain religious interpretations, at the expense of others, violating constitutionally protected freedom of religion.<sup>251</sup>

The authority to arbitrate, and the agreement about the procedure governing the arbitration, derives from the parties to the arbitration. The court would not privilege

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<sup>250</sup> *Ibid.*

<sup>251</sup> Rights & Democracy, "Behind Closed Doors: How Faith-based Arbitration Shuts Out Women's Rights in Canada and Abroad," 6.

certain interpretations over others, but would uphold what the parties themselves had agreed to be bound. That being said, an individual might dispute the arbitrator's interpretation of the religious rules. Presumably Boyd attempted to resolve this problem by introducing the requirement of a Statement of Principles of Faith-Based Arbitration. This Statement would explain the procedure and goal of faith-based arbitration.<sup>252</sup> If the procedure and interpretation of religious rules were laid out prior to the arbitration, the court could refrain from ruling on substantive issues and simply rule on whether or not the parties abided by the agreed-upon procedure.

Enforcing religious rulings does not necessarily force the court to determine what is substantively required by any faith. The court refuses to make pronouncements about religious dogma, and requiring them to do so would have them overstep their jurisdiction. The court could vitiate a contract on procedural grounds without having to choose between different religious interpretations if the parties were required beforehand to identify which religious interpretation would govern the arbitration. Court rulings on procedure would ensure there was valid consent, ensure that each party was heard and given equal consideration by the arbitrator, that the parties were apprised of their secular rights, and that no other procedural irregularities had occurred.

Parties should not be allowed to contract out of the right of appeal. They should be told at the time of arbitration how to initiate an appeal to the court in the event that they want to challenge the decision. Shachar suggested that faith-based arbitration should include mandatory judicial review of all arbitration decisions.<sup>253</sup> Marion Boyd was not prepared to accept this proposal. "State scrutiny of each privately ordered arrangement

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<sup>252</sup> Boyd, 136.

<sup>253</sup> Ayelet Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," *McGill Law Journal*, 50 (2005): para. 39.

implies that no one is capable of making decisions on their own behalf. This is a degree of paternalism which I would find intrusive and inappropriate.”<sup>254</sup>

While it is impractical to suggest that the court review every privately-ordered contract, it could be available to oversee arbitration proceedings if asked to do so, particularly if there was a procedural, rather than a religious, question.

The court would also have to decide whether custody arrangements were decided in the best interests of the children. The *Children’s Law Reform Act* ensures that custody arrangements are always subject to the “best interests of the child” test.<sup>255</sup> The *parens patriae* jurisdiction of the court requires that they protect and uphold the interests of the child. While this may allay the fears that patriarchal religious rules could harm children, applying the “best interests of the child” test means that secular interests will probably trump religious law. It is not clear how much deference the court should give to religious authorities in arbitration over custody matters. The rights of the child, who is not a party of the proceeding, and the rights of the parents to decide how to raise their children, is a difficult issue that would have to be considered. This chapter does not attempt to answer this dilemma.

The safeguards Boyd suggested would increase the time and cost associated with faith-based arbitration, but they are needed to ensure that both parties understand their rights and entitlements at Canadian law and to ensure that the arbitration process is fair.

Fathers Are Capable Too (FACT) submitted concerns that independent legal advice makes faith-based arbitration overly legalistic.<sup>256</sup> Although the time and cost benefits of arbitration would be diminished, the process would still retain several benefits.

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<sup>254</sup> Boyd, 76.

<sup>255</sup> *Children’s Law Reform Act*, R.S.O. 1990, c. C. 12.

<sup>256</sup> Boyd, 38.



The parties could still tailor the process to suit their needs and could keep the details of their family dispute private. The procedure would still be more flexible and informal than it would be in court. Arbitration would allow the parties to play an active role in the dispute resolution process and appeal to the law of their choice, making recalcitrant individuals more likely to accept the arbitrator's final decision.<sup>257</sup>

Those religious groups that advocate in favour of faith-based arbitration are doing so to secure the right to resolve disputes according to religious laws in a legally binding way. If the most important thing is to be able to enforce disputes resolved according to religious laws, allowing faith-based arbitration with certain safeguards may be an acceptable compromise, even though it diminishes the cost and time benefits of arbitration. The safeguards help reconcile concerns that women will be treated unequally and concerns that they cannot "truly" consent to giving up the gender rights that the secular law protects.

The National Association of Women and the Law (NAWL) emphasized the danger that fundamentalist religious interpretations pose to women, and argued that allowing faith-based arbitration will lend support to fundamentalist views.<sup>258</sup> Shachar noted that the issue is not clear cut. While she recognized that "well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group, and may, in effect, work to reinforce some of the most hierarchical elements of a culture,"<sup>259</sup> she also argued that state oversight of private arbitrations might actually help combat fundamentalism. She suggested that fears of

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<sup>257</sup> *Ibid.*, 66-67.

<sup>258</sup> Jackie F. Steele, Report of the 'International Perspectives on Religious Arbitration in Family Law' Conference, Report prepared for National Association of Women and the Law, May 2005. [online]; accessed 09 Aug. 2006; available from <http://www.nawl.ca/lob-rfl.htm>.

<sup>259</sup> Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights, (Cambridge: Cambridge University Press, 2001), 3.

assimilation can motivate cultural leaders to try to protect traditions by imposing strict behavioural rules on women.<sup>260</sup> If the state allowed religious groups some autonomy over family law decisions, it could lessen the threat of assimilation and religious leaders might be more flexible with regard to women.

Women will be subject to family law decisions based on fundamental religious interpretations regardless of the government's position on faith-based arbitration. The *Act* does not prohibit private, non-binding arbitration. It does not prohibit parties from seeking advice from religious authorities. It merely prohibits them from using the law to enforce these decisions.

Introducing faith-based arbitration with the safeguards discussed here cannot guarantee protection for all women, but it limits the harm that could be caused if the safeguards were not in place. It also could result in less harm than might occur from the government's refusal to recognize faith-based arbitration decisions at all. Ontario's decision did not stop faith-based arbitration; it will continue in the private sphere, without the benefit of government oversight or safeguards.

#### Faith-Based Arbitration, Gender Equality and Individual Autonomy

Opponents of faith-based arbitration worried that women would be unduly pressured to enter into arbitration agreements by socioeconomic concerns, abusive relationships, low self-esteem, low education rates, immigration considerations, and pressure from the religious community.<sup>261</sup>

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<sup>260</sup> Ayelet Shachar, "Should Church and State be Joined at the Altar? Women's Rights and the Multicultural Dilemma," in *Citizenship in Diverse Societies*, eds. Will Kymlicka and Wayne Norman, (Oxford: Oxford University Press, 2000), 202.

<sup>261</sup> *Ibid.*, 51.

Allowing women to form contracts to arbitrate according to religious laws preserves their identity and dignity as individuals. A woman who decides to arbitrate according to religious rules that discriminate based on gender might not view her decision as “harmful”; on the contrary, it may be more meaningful than if she were forced to adjudicate the matter in court and was awarded more property.

Faith-based arbitration preserves individual dignity by recognizing the right to bind oneself to religious rules, even if the majority finds those rules to be oppressive. The Canadian majority must realize that some women want to contract out of laws that are designed to protect them. The principle of individual autonomy would suggest that women who are properly informed of their property rights under Canadian family law could give up those rights. If the state used its monopoly on coercive power to legally enforce decisions that were based on rules that discriminate against women, however, it would violate the principle of gender equality. This problem is further complicated by questions of whether women in a closed community are truly able to consent to discriminatory rules.

Faith-based arbitration could strike a compromise between gender equality and individual autonomy by allowing women to order their family lives through legally binding arbitration, but enacting safeguards to help protect vulnerable parties in the arbitration process. The safeguards would help ensure that a woman can make an informed choice to submit to arbitration that is governed by a patriarchal interpretation of religious rules.

Libertarian political theory emphasizes the right of individuals to make choices about how to best live their own lives. John Stuart Mill argued,

He cannot rightfully be compelled to do or forbear because it will be better for him, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.<sup>262</sup>

This sentiment was echoed by Boyd.

People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law...<sup>263</sup>

Boyd noted that, “A tension between protection of the vulnerable and a degree of paternalism that involves controversial assumptions about vulnerability is inherent in this discussion.”<sup>264</sup> This statement is particularly true when it comes to the debate around the concept of “consent.”

The quality of consent, or the decision to arbitrate is a true and free decision, has been of concern to women’s groups.<sup>265</sup> How the court should measure true consent is problematic. Although any arbitral award could be overturned if there was coercion, it generally refrains from doing so unless the coercion was violent, or there was a threat of physical violence.<sup>266</sup> But there are also more subtle forms of coercion that can be exerted on women.

Submissions from the International Campaign Against Shari’a Court in Canada, the Women’s Legal Education and Action Fund and NAWL questioned the ability of Muslim women in particular to consent to arbitration due to socioeconomic and immigration concerns, and family or community pressure.<sup>267</sup> It is problematic to frame the issue of consent in cultural terms. The debate has held Muslim women to a double standard. The argument presented is problematic. If one accepts that Muslim women

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<sup>262</sup> John Stuart Mill, *On Liberty*, (Reprint; Oxford: Oxford University Press, 1991), 14.

<sup>263</sup> Boyd, 76.

<sup>264</sup> *Ibid.*, 11.

<sup>265</sup> Bakht, “Family Arbitration using Sharia Law.”

<sup>266</sup> Boyd, 136.

<sup>267</sup> *Ibid.*, 49-52.

cannot give “true” consent due to socioeconomic, family, or other social pressures, it follows that either the lives of Muslim women are such that they are under substantially more pressure than members of other cultural or religious groups, that they are somehow inherently less capable of making free decisions, or that no woman’s consent should be accepted. None of these, however, are valid conclusions.

Concerns motivated by economics, family, community, children, and religion often influence a woman’s decision to arbitrate family law disputes and are not confined to any specific religious, ethnic or cultural community. Pressure exists in all family law arbitrations, including those held pursuant to statutory laws.

If Muslim women are not allowed to contract out of their rights because they are prone to socioeconomic disadvantage, then poor women of all backgrounds should be subject to the same limitation. If Muslim women cannot consent to arbitration because of fears that they are doing so from pressure by their family or community, all women who are strongly influenced by their families or communities should be prohibited from consenting to arbitration.

The state did not remove arbitration as an option for all family law disputes, however, it only removed the option to arbitrate according to non-Canadian laws. Non-religious women may face the same pressures that women’s groups worried would harm Muslim and other religious women. If it is impossible to judge the quality of a woman’s consent to arbitration, then one should question whether arbitration should be an option for any family law disputes.

The argument that it is impossible to judge the quality of a woman’s consent implies that women as a whole are somehow in need of protection and inherently less

able to consent. This type of argument undermines the ability of women to fully exercise their rights as citizens and undermines the principle of individual autonomy.

This is not to say that all consent should be taken at face value. Pressures to arbitrate have been documented. Muslim and Jewish religious authorities have admitted to pressuring their members. When he established the Islamic Institute of Civil Justice, Syed Mumtaz Ali stated that once arbitration was available, Muslims had to use that forum in order to be considered “good” Muslims.<sup>268</sup> Rabbi Reuven Tradburks admitted to pressuring Jewish people in Toronto to use arbitration.<sup>269</sup> It is more accurate to say that some women (Muslim and otherwise) will be unduly pressured to consent to arbitration, while others will give true, free, informed consent.

If the government were to allow faith-based arbitration, then, it should focus on establishing a procedure that is free, as much as possible, from coercion, duress and fraud. The safeguards recommended by Marion Boyd would help achieve this goal. To ban faith-based arbitration because of concerns about a Muslim woman’s ability to truly consent reinforces the view that Muslim women are somehow backwards, particularly vulnerable, and less capable of granting consent. As long as the woman is informed of the consequences and has a right to appeal to the secular courts instead of engaging in faith-based arbitration, she should be permitted to contract out of the secular rights that attempt to equalize property division.

The debate between autonomy, cultural rights and gender equality is not easily resolved. It appears to require choosing one fundamental right over another.<sup>270</sup> If safeguards are put in place to ensure that the woman has been educated about her rights,

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<sup>268</sup> Boyd, 3.

<sup>269</sup> *Ibid.*, 56.

<sup>270</sup> Eisenberg, “Identity and Liberal Politics,” 252-3.

has received independent legal advice and has asserted that her decision to arbitrate is voluntary, her consent should be deemed to be sufficient. If consent is not sufficient in these circumstances, it is arguably never sufficient.

Jeff Spinner-Halev reminds us that liberal democracies must recognize that some individuals choose to belong to illiberal communities.<sup>271</sup> The perspective of individual autonomy shifts the focus from whether the government can accommodate the illiberal practices of different cultures to whether individuals should have the right to submit to illiberal practices. In permitting faith-based arbitration, the state does not hand jurisdiction to religious authorities to govern their members, but rather gives individuals the ability to contract into resolving their dispute according to religious laws. In this view, individuals who are fully informed and whose decisions do not cause actual harm to other people should be permitted to arbitrate according to the laws of their faith. Enacting faith-based arbitration with safeguards might be a viable, practical compromise between autonomy and gender equality.

The government stated it was concerned about women's rights and assured the public that any decision made about faith-based arbitration would take women's concerns into consideration.<sup>272</sup> When their decision was announced, however, the government was silent about the fact that banning faith-based arbitration could also have harmful implications for women.

The absence of faith-based arbitration, or a similar mechanism, may harm women by forcing them to decide their disputes solely within their religious community, where

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<sup>271</sup> Spinner-Halev, 157.

<sup>272</sup> Ministry of the Attorney General, "Statement by Attorney General on the Arbitration Act, 1991," Sept. 8, 2005, [online]; accessed 15 November 2005, available from [http://ogov.newswire.ca/ontario/GPOE/2005/09/08/c7547.html?lmatch=&lang=\\_e.html](http://ogov.newswire.ca/ontario/GPOE/2005/09/08/c7547.html?lmatch=&lang=_e.html).

there are no legal safeguards. It forces women to make a choice: they can decide the dispute according to their religious values exclusively within their community, or they can set their dedication to their religious laws aside and use the secular system. Forcing them to make this choice can lead to women isolating themselves within their religious communities.

### How Faith-Based Arbitration Can Prevent Isolation

The ICHRDD argued faith-based arbitration is inconsistent with multiculturalism because it appears to divide people into separate cultural or religious groups.<sup>273</sup> The Canadian Muslim Congress echoed these fears of “ghettoization.”<sup>274</sup> The fear is that faith-based arbitration will encourage individuals to interact mainly within their own community, preventing their integration into mainstream Canadian society, and creating divisions that will foster intolerance.<sup>275</sup>

Ontario’s decision to ban faith-based arbitration only refuses to give arbitral awards the force of law. It does not prohibit arbitration from occurring behind closed doors. Religious arbitration will continue to take place in mosques, synagogues, churches and private residences, away from state oversight and without safeguards. This is the greatest threat, as it leaves vulnerable people with little protection.

Faith-based arbitration might encourage participation within the state by providing religious minorities with the option to apply religious rules within the legal system. As noted in Chapter Three, the court has been unclear about whether it will uphold family contracts that refer to religious obligations. Without faith-based arbitration, individuals

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<sup>273</sup> Rights & Democracy, “Behind Closed Doors: How Faith-based Arbitration Shuts Out Women’s Rights in Canada and Abroad,” 5; Boyd, 51.

<sup>274</sup> Boyd, 52.

<sup>275</sup> *Ibid.*, 47.



may be completely incapable to have religious beliefs or obligations legally enforced. Although McGuinty implied that faith-based arbitration might threaten cohesion, the current state of the law could also create a divided community. The inability to resolve family issues with reference to religious laws could discourage religious individuals from using the state system. It could encourage them to appeal to their religious authorities instead. Anne Saris noted that in Britain, ethnic minorities have responded to the court's lack of consideration of their cultural differences by operating outside the law.<sup>276</sup>

Another apparent threat to cohesion is the concern that faith-based arbitration violates the rule of law. The Muslim Canadian Congress submitted that faith-based arbitration violates the rule of law by dividing people into separate religious groups and allows different laws to apply to different people based on their religious beliefs.<sup>277</sup>

Faith-based arbitration may be consistent with the rule of law. As outlined in Chapter Two, the definitions of the rule of law do not require subjecting every person to identical laws in every instance. It requires that laws be transparent, publicly available, applicable to state officials, and justiciable by a state legal system.<sup>278</sup> Allowing parties to contract out of secular law in family disputes does not necessarily violate the "rule of law." Faith-based arbitration does not establish multiple legal systems that operate parallel to the state. Arbitration remains subject to judicial oversight, making it a method of alternative dispute resolution based on contract that is subordinate to the state legal system.<sup>279</sup> The state would not force people to abide by specific laws or use different legal systems based on their religious, cultural or ethnic background. Instead, it would give

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<sup>276</sup> *Ibid.*, 81.

<sup>277</sup> *Ibid.*, 30.

<sup>278</sup> Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada," University of Toronto Law Journal 55, no. 3 (2005): 716.

<sup>279</sup> Boyd, 88.

individuals the option to legally bind themselves to specific religious rules. Instead of violating the rule of law, the state would be recognizing legal pluralism by giving individuals this choice.

Legal pluralism asserts that several legal systems coexist in society.<sup>280</sup> From this perspective, other legal systems are not necessarily subordinate to state law, except in the sense that the state has a monopoly on power to enforce its laws.<sup>281</sup> Canadian law exists alongside religious and cultural legal systems, and each set of laws might have different rules for dealing with the same social issue.<sup>282</sup> An individual who believes that their religious laws are the only legitimate laws is likely to give them primacy over state law, even if the two conflict.

Griffith's distinction between "juristic legal pluralism" and the "social scientific view of legal pluralism" is a helpful framework to consider how legal pluralism applies to faith-based arbitration. As discussed in Chapter Two, juristic legal pluralism occurs when different laws are applied to individuals based on their ethnic or religious identity. The social scientific view of legal pluralism views the state law as simply one of many types of laws that exist within society.<sup>283</sup> The two differ, then, to the extent that the state institutionalizes legal pluralism.

Instituting faith-based arbitration is like the juristic model of legal pluralism because the state gives cultural rules the force of law, but the faith-based arbitration system would avoid many of the complicated issues traditionally associated with juristic legal pluralism. Questions about when a subgroup's law applies, about deciding what

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<sup>280</sup> Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 870.

<sup>281</sup> Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (Summer, 1993): 193.

<sup>282</sup> Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14, No. 3 (Autumn, 1987): 280.

<sup>283</sup> Merry, 871.

group individuals belong to, choice of law rules, and which subjects the subgroup's law should be allowed to govern<sup>284</sup> are avoided because an agreement to arbitrate is essentially a voluntary contract. Rather than the state slotting individuals into different groups and deciding which laws apply to them based on group membership, the individual identifies with a specific group, specifies which religious law he or she wants to govern the proceedings, and gives the arbitrator the authority to act accordingly. The parties opt into the system, rather than having it forced on them by the state. No one would be forced to use faith-based arbitration.

McGuinty rejected legal pluralism by banning faith-based arbitration. When he said that Ontarians must be subject to a single law, he was probably referring to laws enacted by the government rather than suggesting that the government only has one set of laws that apply equally to everyone. His statement that faith-based arbitration is “inconsistent with one law for all Ontarians” disregards the fact that the state can apply multiple laws to family disputes. Immigration and international law has allowed Ontario courts to recognize and apply the family laws of other countries. Different Acts deal with the same issues. For example, the *Divorce Act*<sup>285</sup> and the *Children's Law Reform Act*<sup>286</sup> both deal with child custody and may have different results depending on which one is used in the custody application. Family law also differs between provinces. McGuinty did not mean that we are all subject to the *same* law; he meant that we are all subject to *Canadian* law. The government appeared to be more concerned about allowing laws that stem from cultural or religious authorities than about having more than one law apply within the province. This might stem from a more restrictive view of the extent to which

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<sup>284</sup> *Ibid.*

<sup>285</sup> *Divorce Act*, [R.S. 1985, c. 3 (2<sup>nd</sup> Supp.)].

<sup>286</sup> *Children's Law Reform Act*, R.S.O. 1990, c. C. 12.

a state can accept religious discourse and reasoning in the public sphere, or from concerns that patriarchal religious laws will violate principles of gender equality.

The government's position that faith-based arbitration is "inconsistent with the principle of one law for all Ontarians" is debatable. Allowing faith-based arbitration gives minorities an option to abide by religious and state laws at the same time. By encouraging them to appeal to the state to resolve family law disputes, the state has an opportunity to institute safeguards and oversight while at the same time sending the message to minorities that their religious beliefs are valued and can be consistent with Canada's institutions.

### Conclusion

The political debate over faith-based arbitration focused on its potential to harm women and its potential to segregate groups based on cultural differences. This chapter argued that faith-based arbitration can be enacted in a way that minimizes these effects.

Rather than isolating minorities, faith-based arbitration invites them to use state institutions to resolve their disputes. It does not violate the rule of law by creating separate legal systems based on culture or religion. It is a dispute resolution mechanism that is subordinate to state law and is equally available to everyone within the state. It provides a way for religious people to resolve their family disputes according to religious laws through a procedure that is governed by the state. It potentially avoids the justice system's insensitivity by giving minorities recourse to a legal mechanism that understands the importance of religious beliefs.

Recognizing the right of religious people to resolve their family law conflicts in accordance with the tenets of their faith legitimizes their religious laws and sends the

message that the state recognizes the value of their beliefs. This benefits a multicultural state by encouraging minorities to use its institutions, thus becoming participating members of society. It allows individuals to follow the law that holds the most authority for them in a way that remains subject to state jurisdiction. The individual can be assured that the decision is both legal and in line with their religious faith because the final decision has been approved by both a religious authority and the state. They would no longer be forced to choose one law over the other.

Faith-based arbitration could potentially harm women if safeguards are not enacted to ensure they have independent legal advice, are informed of their statutory rights, and are able to contract out of judicial review. Any attempt to institute faith-based arbitration must limit this harm. Adopting the safeguards discussed in this chapter would afford protection to women far beyond what existed in the *Act* before the recent amendments. Canada has an interest in fostering the autonomy of all individuals, including religious women who want to make decisions about how to resolve family disputes. The state should respect a woman's decision to submit to arbitration as long as that decision is informed and given voluntarily.

Marion Boyd recognized the importance of individual autonomy when she wrote, "Commitment to individual rights lies at the core of the legal and political organization of any liberal democracy...tolerance and accommodation must be balanced against a firm commitment to individual agency and autonomy."<sup>287</sup> We can only accommodate religious rules through faith-based arbitration if they respect individual rights. Individual rights can be protected through the safeguards discussed in this chapter, and individual autonomy is enhanced by respecting the individual's choice to bind him or herself to religious rules.

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<sup>287</sup> Boyd, 92.

Accepting faith-based arbitration means that the courts will have to enforce decisions that treat women differently on the basis of gender. The authority for these decisions does not arise from the state but from the individuals. The individual is the one who is consenting to submit to laws that treat women differently than men. The state is not necessarily encouraging illiberal practices, but encouraging individual autonomy. This is consistent with the liberal belief that individuals should not be prevented from making decisions simply because the majority does not agree with those decisions.

On the other hand, Canada is a liberal democracy with a commitment to gender equality. Enforcing an arbitral decision that has divided based on a belief that the husband has a greater entitlement because of his gender may undermine this commitment. Arguably, the state should not give political legitimacy to religious laws that violate the principle of gender equality.

If safeguards were introduced to the faith-based arbitration process, the state would be ensuring the procedural integrity of the arbitration and helping to ensure that women were making an informed decision to contract out of her secular rights. If a woman is making an educated choice as an autonomous, capable individual, she is entitled to that right. Safeguards that protect vulnerable parties while allowing them to form contracts might be a good compromise between gender equality and autonomy.

## Chapter Five Conclusions

This thesis evaluates Ontario's decision to ban faith-based arbitration. Dalton McGuinty justified this decision to the press on the grounds that faith-based arbitration violates Ontario's common legal ground and that it cannot be part of a cohesive multicultural society.

This thesis demonstrates that both of these claims are contestable. Canada is committed to multiculturalism, which is described as allowing all citizens to keep their cultural identity while participating in the state's institutions. This implies that, ideally, individuals can feel a sense of belonging to their cultural group and a sense of being Canadian at the same time. But while the goals of multiculturalism are relatively clear, there is no consensus on how it is best achieved.

The theories of pluralism differ as to how an ethnically diverse society is best governed. Egalitarian liberalism generally suggests treating individuals the same under the law, despite their differences. Even if individuals have equal opportunities with the state, the choices they make means that unequal outcomes will result. This is not unfair, however; justice is achieved as long as individuals have equal access to and are treated equally under the law. The politics of recognition argues that treating people equally can have unequal results. Minorities whose cultural or religious practices differ from the Canadian tradition might be affected by laws more harshly than the majority. They may request different treatment, and society should decide whether the request is reasonable through a democratic dialogue that is informed by the norms, values and standards of the minority's culture.

Whether Ontario made the right decision to ban faith based arbitration in the name of multiculturalism depends on how it believes a multicultural society should best be governed. Should the law be flexible and allow, in some circumstances, cultures to be held to different rules of their choice, or should all cultures be treated the same, in spite of their differences? McGuinty's comment that faith-based arbitration violates Ontario's legal common ground promotes the view that all cultures must be treated identically under the law.

There is no consensus that faith-based arbitration violates the rule of law. The definitions of the rule of law identified in Chapter Two show that it can be defined broadly, so that it does not necessarily mean that every citizen must abide by the same laws. Instead of violating the rule of law, allowing faith-based arbitration might be a way of giving state recognition to the reality of legal pluralism. Legal pluralism suggests that there are several different sources of law at work in society, of which the state is only one. Some individuals feel that their religious laws hold more authority than the state laws.

Faith-based arbitration may not violate the rule of law because it is not a juristic model of legal pluralism. The state would not apply different laws to different people depending on their cultural or religious affiliation. It could never force individuals to submit to faith-based arbitration, or abide by non-governmental laws. The authority for the arbitration, and the authority to be bound to an alternative set of laws, stems from the individual rather than from the state. Faith-based arbitration is not a parallel legal system; it would remain subordinate to the state, subject to its oversight and judicial review. It might encourage minorities to appeal to the state rather than feeling forced to appeal just to their religious authorities.



The reasons McGuinty gave to the press to justify Ontario's decision, therefore, can be refuted. It depends on the type of society Ontario wants to be. If Ontario seeks to include all members in its institutions, to allow individuals to participate in the state and feel a sense of belonging while at the same time keeping their identity, the decision to ban faith-based arbitration is not obviously the best choice. The government began by engaging in a democratic dialogue when it commissioned former NDP Attorney General Marion Boyd to consult with groups who were in favour and against faith-based arbitration and make recommendations. But they then ignored her recommendations and banned it. Ontario should re-consider adopting faith-based arbitration, or at the very least re-consider the reasons why it was banned.

Adopting faith-based arbitration could be beneficial as it would make the legal system more responsive to religious difference. Chapter Three shows that the court has difficulty dealing consistently and sensitively with religious obligations in family law contracts.

Contract law generally allows individuals to order their affairs as they wish, but when religious obligations form the basis of the contract, it might be void for public policy reasons. Cases dealing with Islamic marriage contracts, or *mahr* agreements, have differed between provinces. In Ontario, *Kaddoura v. Hammoud* ruled that the contract was unenforceable because it referred to *mahr*. The British Columbia court upheld the *mahr* in *Nathoo v. Nathoo*, *Amlani v. Hirani*, and *M. (N.M.) v. M. (N.S.)*. The different outcomes are surprising since the provincial family law legislation is similar and there was nothing in the cases to suggest that different circumstances warranted this differential treatment.

In addition to the inconsistent results, insensitive judicial discourse within the cases reveals the difficulty that lies in interpreting religious contracts. In *Kaddoura*, the judge inappropriately compared specific, monetary Muslim contract to vague Christian marriage vows of “fidelity” and “love.” He suggested that, just as these Christian vows cannot be enforced legally, neither could the *mahr* agreement. This is an inappropriate comparison, since the courts could not enforce a vague vow like “love” but could enforce a contract to pay a specific, previously agreed-upon sum of money. He refused to enforce the *mahr* because it is a religious obligation.

Although the *mahr* agreements were upheld in British Columbia, the decisions had a tendency to ignore the religious aspect of the contracts. When construing whether they were enforceable, the court looked mainly to its secular construction than noting the religious obligation. In *Amlani v. Hirani* religion was barely mentioned at all. Failing to address how religious aspects of the contract fit in suggests that in order to recognize the legality of the contract, the court had to disregard the religious obligations on which the contract was based. It ignores the context of the contract.

The British Columbia court was willing to find that because the parties wanted to be married religiously, and because they knew that the *mahr* was an element of the religious marriage, they agreed to it and this agreement was enforceable. The opposite the approach was taken by the court in *Kaddoura*. The different conclusions might be attributed to different beliefs on the importance of exit rights. The British Columbia court notes that the parties had a right of exit; they could have chosen not to marry religiously had they not wanted to abide by the *mahr*. In *Kaddoura*, the court noted that the parties had no choice but to enter into the *mahr* if they wanted to be married religiously, and

questioned the quality of consent given this situation. The court should clarify its position on this matter.

The current state of the law in Ontario suggests that couples cannot make a binding contract dividing marital property according to religious beliefs. It is not the content of the contract that is in dispute, but the religious intention underlying it. The cases suggest that religious minorities, in their capacity as religious individuals, have difficulty creating binding contracts. The court may either have to overlook the religious context of the contract, or the minority may have to disguise the religious beliefs in secular language that the courts can understand.

Because religious minorities may not be able to enforce a marriage contract that refers to religious beliefs, and because secular laws can be inconsistent with the values of some religions, faith-based arbitration might improve the justice system by allowing minorities to resolve family disputes in a legally binding manner according to religious beliefs. It would make the legal system more responsive.

One might question whether introducing faith-based arbitration would make the legal system more “fair” as well as increasing its sensitivity to religious difference. Would faith-based arbitration somehow make the legal system more objectively equitable? The answer to this question seems to depend on what one believes the role of the state should be.

Whether or not faith-based arbitration would make the legal system more “fair” is debatable. “Fairness” is difficult to qualify, because what is thought to be “fair” can depend on what one expects from the state. If one subscribes to the belief that “fairness” requires the state to only enforce one set of laws that applies identically to everyone, then faith-based arbitration is unfair. If one subscribes to the belief that “fairness” involves

allowing individuals to live according to the rules that hold the most personal meaning, and bind themselves to those rules through contract law, then faith-based arbitration makes the legal system more fair.

Because egalitarian liberalism emphasizes the equal application of laws, it is the less likely than the politics of recognition to accept faith-based arbitration. Faith-based arbitration would have some members of society resolve their problems according to religious rules, while the rest would appeal to secular legislation.

The politics of recognition is more likely to accept that religious minorities should have a degree of autonomy in family law affairs. The central tenet of the politics of recognition is that every culture deserves equal respect. It suggests that requests to abide by different cultural practices should be evaluated through a democratic dialogue, whereby society identifies its own values, examines their importance, why they are held, and how they conflict with the minority's request. The final decision about whether a cultural practice should be accepted or rejected should be informed by the minorities' norms, values and traditions. It should be examined from the minorities' perspectives.

If we accept that religion forms part of one's identity, respect for that identity seems to suggest that the government should give greater consideration to the ability to legally bind oneself to these deeply held beliefs. To deny individuals this right seems to suggest that there is something about their very identity which is incompatible with Canadian values, such that it cannot be recognized at law. This affects their identity as Canadians, as they may feel they have to choose between their Canadian and their religious identity. This, in turn, can have implications for participation in the state's institutions.

Allowing individuals to arbitrate recognizes the right to order one's affairs as they see fit. It preserves the principle of individual autonomy. On the other hand, faith-based arbitration would require the state to enforce laws that may violate the principle of gender equality. Likely one of the unstated reasons that the government banned faith-based arbitration was because it would give political support to laws that violate the principle of gender equality.

Faith-based arbitration could put the state in a position where, at least sometimes, it would have to enforce decisions that were made according to rules that favour men over women. The state may understandably be reluctant to give political legitimacy to illiberal rules. Should personal autonomy or gender equality prevail in this debate?

The answer to this question must lie in what we expect the state to protect, and how protection is best achieved. Individual autonomy is one of the most important elements of a liberal democracy. Women cannot have autonomy without gender equality, because otherwise they could be subject to different laws than men, or be left without the same rights or same opportunity to exercise those rights. Without gender equality, she might not be able to participate in the state to the fullest extent possible. But do women truly have autonomy if they are not also allowed to reject secular laws meant to protect their equality? Should women be forced to be equal? Some people choose to belong to illiberal groups. Forcing a woman to abide by equality rights, then, also violates the principle of individual autonomy.

One might argue that women are not being forced to be equal. The state is not forcing women to use the secular legislation, but only refusing to enforce laws that are not part of the state. They are allowed to behave any way they want, within the constraints of the law, but the court will not enforce decisions that discriminate against them. But this

does interfere with their autonomy because they do not have the right to contract out of laws that protect their rights to property. Contract law is designed to allow parties to arrange their private lives as they see fit. One might argue that the contracts that violate gender equality could be void because they are contrary to public policy. But if safeguards are in place to help ensure, as much as possible, that the woman's decision to arbitrate according to illiberal rules is informed and her consent is voluntary, this suggests it is against public policy to allow a woman to make this choice. It arguably violates a woman's right to choose for herself the way she would like to order her family affairs. The state is not recognizing her autonomy to make this choice.

Faith-based arbitration, with the proper safeguards, allows the state to balance personal autonomy with gender equality. Marion Boyd's recommendations would have had the government keep faith-based arbitration and enact safeguards to better protect women. The focus on the potential for faith-based arbitration to harm women allowed policy makers to give less consideration to the impact on women who believe it is more important to abide by their religious rules rather than secular laws. Concerns that faith-based arbitration could harm vulnerable parties, such as women, should be taken seriously, and if the government were to re-introduce faith-based arbitration, it must enact safeguards to minimize any potentially harmful effects of the process. Having reviewed the report and the concerns of women's groups, Chapter Four agrees with Boyd's recommendations. They would protect women without forcing them to either choose secular equality or appeal solely to religious authorities.

Faith-based arbitration could be an effective tool to help give recognition to religious minorities in the law and encourage their participation in the legal system in a

way that does not interfere with Ontario's cohesive, multicultural society. The government should reconsider its decision to ban faith-based arbitration.

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